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MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

SPECIAL NOTICE OF THE MEETING OF THE AMERICAN BAR ASSOCIATION.

August 26, 1932.

MR. FRANK W. GRINNELL, *Secretary,*
Massachusetts Bar Association,
60 State Street,
Boston, Massachusetts.

Dear Sir:

The Annual Meeting of the American Bar Association will be held in Washington, D. C., from October 10th to the 15th inclusive. One of the outstanding features of this meeting will be the laying of the cornerstone of the new Supreme Court Building. This should be of great interest to all lawyers and it is hoped that everyone who can will attend.

I am accordingly asking you to bring notice of this great event to the attention of your membership if possible.

Very truly yours,

WALTER H. ECKERT,
Chairman, Publicity Committee,
American Bar Association.

NOTE.

Reproductions of the architect's drawings for the new courthouse appeared in the MASSACHUSETTS LAW QUARTERLY for February, 1932. The programme of the meeting of the American Bar Association appears in the *A. B. A. Journal* for September, 1932.

F. W. G.

Entered as Second-Class Matter at the Post Office at Boston.

THE TERCENTENARY EDITION OF THE GENERAL LAWS.

THE "INTRODUCTION" AND OTHER "GENERAL INFORMATION" ISSUED BY THE SECRETARY OF THE COMMONWEALTH.

As most people in these days, probably including lawyers, are apt to overlook prefaces to books in general and particularly prefaces to law books, the "Introduction" and other "General Information" explaining the purpose, character and scope of the "Tercentenary Edition of the General Laws", just published, is here reprinted in order that the bar may understand the exact character of the book. As is explained in what follows, this new edition, while it is official, has not been *enacted* as were the "General Laws" and the other periodical revisions of 1902, 1880, 1860 and 1836. This new edition is not a revision, but simply a reprint of the annual revisionary work which has been done by the Counsel to the Senate and House ever since the General Laws were enacted in December, 1920, in accordance with the system inaugurated by Hon. B. Loring Young while Speaker of the House, as explained by him in the MASSACHUSETTS LAW QUARTERLY for February, 1922, page 140.

G. L., c. 233, s. 75 provides that,

> "The printed copies of all statutes, acts and resolves of the Commonwealth, public or private, which are published under its authority, . . . shall be admitted as sufficient evidence thereof in all courts of law and on all occasions."

As pointed out in the circular of the Secretary of the Commonwealth, while this statute makes this "Tercentenary Edition" "sufficient" evidence of the law prior to January 1, 1932, its exact legal effect seems to be similar to that of the "United States Code", which provides at the beginning that it "shall establish *prima facie* the laws of the United States general and permanent in their nature, . . . but nothing in this act shall be construed as repealing or amending . . . or as enacting as new law any matter contained in the code."

No official method of abbreviated citation has been specified by the legislature but in order to avoid a confusing variety in this

respect, at the opening of the sitting of the full court in Pittsfield, Chief Justice Rugg made an announcement in substantially the following form, which is to be printed on the fly-leaf of the dockets of the Supreme Judicial Court for the commonwealth.

> "For convenience, it is suggested that, in the preparation of briefs, reference to the General Laws be made to the chapters, sections and paragraphs of the Tercentenary Edition of the General Laws, recently published by the Commonwealth. Such references will appear in the opinions of the court in the following form:
>
> G. L. (Ter. Ed.), c. s.
>
> except in instances, where for historical or other reasons, different references may be deemed desirable."

The matter may seem of small consequence but when it is remembered that this volume will be in use for general reference by the bar and in judicial opinions for the next ten years, at least, and it is desirable that references should be readily understood, both inside *and outside* of Massachusetts, the formal method of citation assumes greater practical importance.

The volumes have been edited under the direction of the General Court by Hon. William E. Dorman, Counsel to the Senate, and Henry D. Wiggin, Esq., Counsel to the House, whose valuable work in the annual editing and revising of statutes *before they are passed* in co-operation with the various legislative committees, and whose enthusiastic professional interest in this work, are not as generally realized as they deserve to be.

We are informed that copies of the volume may be obtained at the office of the Secretary of the Commonwealth for the price of $13, not including the index which is not yet ready and not including transportation charges. Of course, those who do not have the Tercentenary Edition can cite G. L. and the annual blue books.

F. W. G.

Introduction.

As directed by chapter 39 of the Resolves of 1929, chapter 58 of the Resolves of 1930 and chapters 67 and 68 of the Resolves of 1931, the undersigned, counsel, respectively, to the Senate and to the House of Representatives, have prepared for publication this tercentenary edition of the General Laws of 1921, as amended prior to January 1, 1932.

It is to be noted that this edition is not a revision of the general statutes of the commonwealth, enacted as a unit by the

General Court, as were the revisions known as the Revised Statutes of 1836, the General Statutes of 1860, the Public Statutes of 1882, the Revised Laws of 1902 and the General Laws of 1921.

At the special session of 1920, the General Court enacted chapter 640 (now General Laws, chapter 3, sections 51 to 55, inclusive), establishing the plan known as the "continuous consolidation of the general statutes", providing for the offices of counsel to the Senate and to the House of Representatives and directing that they "shall, so far as possible, draft all bills proposed for legislation as general statutes in the form of specific amendments of or additions to the General Laws". One of the principal purposes of said chapter 640 was to make provision for maintaining the general statutes of the commonwealth in such form that new editions might readily be prepared for publication at periodic intervals, without the delay, inconvenience and expense incident to a general consolidation or revision as theretofore conducted, involving the appointment of a highly paid revision commission and a recess committee of the only kind now entitled to compensation under the constitution and also the calling of a special session of the General Court. In the preparation of the tercentenary edition for publication, this purpose has been achieved.

In anticipation of the preparation of this edition, the undersigned have also reviewed the General Laws and amendments thereof in order to comply with mandates of the General Court, directing them to make recommendations for the correction of errors, omissions, inconsistencies and imperfections therein which may come to their attention, accompanied by drafts of legislation to carry such recommendations into effect. These recommendations and accompanying drafts of legislation appear in the reports of the counsel to the Senate and to the House of Representatives filed with the clerk of the House of Representatives and printed as House Document 1360 of 1930 and House Documents 1324, 1370 and 1650 of 1931. Chapters 301, 394 and 426 of the Acts of 1931 were based upon the foregoing reports.

The marginal notations opposite the several sections of the General Laws have been revised to include citations of decisions of the Supreme Judicial Court rendered since the publication of the General Laws, concluding with those contained in Volume 273 of the Massachusetts Reports.

WILLIAM E. DORMAN,
Counsel to the Senate.

HENRY D. WIGGIN,
Counsel to the House of Representatives.

THE COMMONWEALTH OF MASSACHUSETTS.
DEPARTMENT OF THE SECRETARY.
ROOM 118, STATE HOUSE.

September 1, 1932.

GENERAL INFORMATION CONCERNING THE TERCENTENARY EDITION OF THE GENERAL LAWS.

(Printed on a separate pink sheet of paper and distributed with the volumes.)

The Tercentenary Edition of the General Laws is official in the sense that it is authorized by the Legislature and published under the authority of this Commonwealth, and, accordingly, under Section 75 of Chapter 233 of the General Laws it is admissible as sufficient evidence of General Statutes. However, it was not enacted as a new and separate revision and codification of our general statutes, but contains the text of the general statutes, printed as the General Laws (1921 Edition), together with all amendments thereof and additions thereto that have been enacted during the annual sessions, 1921 to 1931, inclusive, and during the special session of 1931.

Because this new edition does not supersede the original edition of the General Laws, but serves rather as a concise and convenient compilation of the General Laws as amended by the Legislature prior to JANUARY 1, 1932, those having the original edition should not discard it for the Tercentenary Edition. This latter edition does not contain:

The tables of disposition of the general statutes enacted prior to 1921, which tables are printed in the original edition.

The text of the chapters or portions of the General Laws that have been repealed, or

Chapter 282 of the General Laws (express repeal of certain Acts and Resolves).

In the Tercentenary Edition, the chapter and section numbers of the original edition of the General Laws and the numbers of inserted chapters and sections have been preserved in the form in which they appeared on January 1, 1932. It should be kept in mind that if the text of any portion of the general statutes or the amendments thereto, as printed in the Tercentenary Edition, differs from such provision of law as last enacted by the Legislature, such enactment ONLY is official.

The Tercentenary Edition does not contain any of the changes in General Statutes made by the Legislature during the year 1932.

WHEN ARE LANDLORD'S FIXTURES WHAT?—A CONSTANT QUESTION FOR LEGAL ADVICE AND A STANDING INVITATION TO LITIGATION.

The practical difficulty which confronts the bar every day in advising about fixtures has been a subject of professional conversation for some time. The following anonymous communication, recently received by the editor, explains practical difficulties in a way which stimulates thinking on the subject, and it is printed here for that purpose.

F. W. G.

LANDLORD'S FIXTURES.

Whether personal property of the type commonly known as landlord's fixtures becomes real estate when installed in a building has been said by the Supreme Judicial Court to be a mixed question of law and fact. (*Commercial Credit Corp.* v. *Commonwealth Loan & Mortgage Co.*, 1931 Adv. Sh. 1615.)

Any layman who has tried to secure a legal opinion of practical value on this subject will heartily agree with this statement of the law. The man in the street, not particularly interested in the niceties of legal science, may be pardoned for questioning the rationality of rules of law which result in decisions like those in the cases of *Commercial Credit Corp.* v. *Gould*, 275 Mass. 48, and *Commercial Credit Corp.* v. *Commonwealth Mortgage & Loan Co., Inc.*, 276 Mass. 335. The issue in each of these cases was whether certain refrigerating equipment when installed remained personal property or became real estate. The physical facts including the particular kind of refrigerating plant furnished by the same company in both cases were identical. In the first case the trial court found an intention to make the refrigerating equipment personal property and in the second case a different trial judge found an intention to make it real estate. Both decisions were affirmed by the Supreme Judicial Court on the ground that even when the evidentiary facts are undisputed, it is for the fact finding tribunal to determine as a question of fact whether or not the property in question has become part of the real estate.

The result of this state of the law is to make impossible any uniformity of decision or predictability of result in this wide field of constantly recurring identical factual situations. Each case depends on the reaction of the particular judge or jury and as a result this class of cases involving property rights is as uncertain and speculative as cases of tort. In other commercial matters, for the sake of inducing uniformity of decisions, as, for example, the question of what is a reasonable time, the Supreme Judicial Court has held it to be a question of law for the court to determine from undisputed facts what is or is not reasonable time. *Demers* v. *Winslow*, 253 Mass. 472.

The variation of decisions in classes of cases involving fixtures has been extreme. Beds have been held to have become real estate and furnaces and oil heating equipment and portable structures to have remained personal property. The possibility of litigation arising out of the present state of the law seems to be unlimited. Most of the cases have involved disputes between conditional vendors of the property in question and subsequent purchasers or mortgagees of the real estate. But in every case where fixtures are installed in a building, it becomes a jury question as to the relative rights of the owner of the building who originally installed the fixtures and subsequent vendees or mortgagees becoming interested in the real estate. The prospect is such as to delight any lawyer or person interested in speculative litigation.

The recent case of *Gardner* v. *Buckley & Scott, Inc.*, 1932 Adv. Sheets 1367, indicates that General Laws, chapter 184, section 13, has entirely failed to introduce any measure of certainty into this branch of the law. In that case the dispute was between a conditional vendor of an automatic oil heater and the subsequent mortgagees of the real estate in which the automatic oil heater had been installed in the usual way. The trial court found that although this type of personal property fell within the classes specified in General Laws, chapter 184, section 13, the statute did not apply for the reason that the equipment was not so attached as to lose its character of personal property and become real estate. In affirming the decision of the trial court the Supreme Judicial Court said:

> "The mortgagee's rights depend upon whether that equipment had become part of the realty and had lost its character as personal property. . . . The statute is negative in character, it enables a conditional vendor, by giving notice for which it provides, to avoid a loss which might otherwise come to him from the operation of the law laid down in *Clary* v. *Owen*, 15 Gray 522."

This case holds in substance therefore that the statute does not give to subsequent mortgagees or purchasers of real estate any rights additional to those given them at common law: it merely affords conditional vendors of personal property a means of protecting themselves in a certain class of cases against the strict rules of common law in cases where the property when acquired would otherwise be held to have become real estate.

It had been supposed that the statute was much broader than thus construed. This is indicated by the statutory amendment following the case of *Medford Trust Co.* v. *Priggen Steel Co.*, 273 Mass. 349. There it was held that the statute did not apply to improvements, such as portable garages or buildings, and that the particular portable garages involved in that case were intended to be personal property after installation.

As a direct result of this case, General Laws, chapter 184, section 13, was amended to include specifically within its terms

"buildings of wood or metal construction of the class commonly known as portable or sectional buildings." It seems obvious that the legislature did not foresee the narrow construction of the statute which the Supreme Judicial Court has found is required by its terms.

Business men are entitled to a more certain and predictable state of the law in this class of transactions than is the case at present. Where the subject matter permits, the rules of law applicable to commercial situations and property rights should be such as to yield uniformity of decisions. The statute should be amended so as to eliminate the necessity for exhaustive investigation and conjecture as to the probable "intention" of the owner of the real estate in installing the fixtures. By custom, buildings and dwellings are not deemed habitable or rentable without certain types of fixtures. The statute should provide that fixtures of such a character irrespective of the manner of installation should become real estate unless the rights of the conditional vendor are saved by a proper record in the registry of deeds.

A LIBRARIAN'S REQUEST.

Professor E. R. James, Librarian of the Harvard Law School, has recently sent the following request to graduates of that school. In view of the extreme prevalence of the modern housekeeping habit of throwing things away, this may interest the bar in general to help librarians in general. F. W. G.

LAW SCHOOL OF HARVARD UNIVERSITY,
CAMBRIDGE, MASS.

Library,
Langdell Hall.

To Members of the Harvard Law School Association:

The Library of the Law School, realizing that members of the Association may from time to time wish to clear their offices of accumulated material which is no longer useful to them, suggests that it will be very glad to receive from members of the Association old text books, pamphlets, numbers of legal periodicals, city ordinances, local legal publications, memorials to deceased members of the bench and bar, bar association reports, reports of bar association committees, session laws, revisions, etc. If, instead of throwing this material away, you will be so kind as to send it to us and let us go through it and pick out what is useful for the library either for placing on our shelves here or for exchange purposes, the library will be very deeply grateful. We do not want advance sheets or annual volumes of digests, but anything else, whether it seems to have an immediate value or not, will be very gratefully received.

The library will very deeply appreciate anything that may be done by the members of the Association in response to this request.

ELDON R. JAMES,
Librarian.

"APPELLATE" PROCEDURE IN DISCIPLINARY MATTERS.

The confused condition of professional thought on both sides of the bench in regard to the essential nature of disciplinary proceedings and its procedural results is, perhaps, not as surprising as it may seem on first impressions, although to the mind of a practical business man it must seem peculiar. The growth in the number of disciplinary problems in recent years has focused attention on a closer analysis of the nature of the judicial duty and responsibility to the public in connection with the character and conduct of the bar, with the result that these duties and responsibilities and the nature of the procedure for their performance are becoming clearer.

As reported in the press, Mr. Justice Field, in the course of a recent disbarment hearing, said,

> "I do not regard disbarment primarily as a punishment, though in effect it is. It is a decision that a man, by reason of his conduct, should not be permitted to exercise the privilege of practising at the bar. It is a matter for the protection of society rather than a punishment in the individual case."

While there is nothing new in this view, as Mr. Justice Field has simply reflected what has been repeatedly explained by the full court, yet it is always difficult for men to appreciate fully an impersonal standard and to subordinate the more personal view of disciplinary proceedings to the public interest.

In the QUARTERLY for January, 1931, pages 75–80, we printed the proceedings in a disciplinary case from Hampden County which concluded with an order to the Superior Court, "Petition dismissed without prejudice". After some discussion both of the case and of the order, we raised the question of the meaning of such an order, "Without prejudice to what or to whom?". The lawyer appointed to conduct the proceedings does not represent anyone. He represents an idea which it is the business of the court and its officers to protect—the idea of the public interest in the bar. Do the words "without prejudice" add or subtract anything? Could the Superior Court make an order binding itself or the Supreme Judicial Court *not* to inquire further or to reconsider the conduct of one of its officers?

A case recently arising in another county has raised the question of procedure as a subject of current conversation among lawyers. The case is said to have been brought before the Superior Court on a petition or other form of information filed by a bar association. The member of the bar appointed by the court in accordance with the statutory practice conducted the proceedings and the court is reported to have "dismissed" them "without prejudice". The questions thereupon arise, how can such a case be carried to the Supreme Judicial Court on behalf of the public and what is the position of that case before the court, if, and when, it gets there?

Hitherto, such matters have come before the Supreme Judicial Court usually, if not always, on exceptions taken by the respondent after a disbarment or other disciplinary order has been entered against him (See *Matter of Ulmer*, 268 Mass. 373 at p. 390 and *Matter of Sleeper*, 251 Mass. 6 at p. 10). In the latter case (at p. 12), the court describes the procedure as follows:

> "A proceeding for the disbarment of an attorney at law is at common law and not in equity. Therefore, when in such proceeding questions are presented to this court respecting general or special findings of fact made by the trial court, such findings stand when they are warranted by direct testimony or as inferences from all the evidence. The only matter for us to decide, even upon a full report of the evidence, is whether the general or special findings made can be sustained on any reasonable view of the case as presented to the trial court. *Randall, petitioner*, 11 Allen, 473. *Boston Bar Association* v. *Greenhood*, 168 Mass. 169, 182. *Boston Bar Association* v. *Casey*, 227 Mass. 46, 51. *Moss* v. *Old Colony Trust Co.*, 246 Mass. 139, 143, 144."

We respectfully suggest that the foregoing description of the procedure with its acceptance of the restricted functions of the Supreme Judicial Court in reviewing findings and action of the Superior Court seems inconsistent with the character of the disciplinary function and responsibility of the court as described by Mr. Justice Field in the statement quoted and by Mr. Justice Hammond, for the full court, in the Casey opinion in 211 Mass. and repeatedly reaffirmed in the Ulmer case and in the recent action of the court appointing special commissioners to inquire into abuses in connection with accident cases, the proceedings in which were printed in the MASSACHUSETTS LAW QUARTERLY for February, 1932, pages 41–45.

In the current proceedings under the order of the court above referred to, the investigation is conducted by the special commissioner and upon the coming in of his report if the matter seems to the court to call for further consideration, notice is given to the individual concerned and the matter is heard by the court and acted upon in any way in which it sees fit, provided the respondent is fairly treated. As the court has said, "form is not essential" in a matter of this kind. Fair treatment in matters of substance seems all that is essential.

The only reason why a disbarment proceeding is brought before the court by a bar association is for the protection of the public interest in the character of the bar. The court has decided that in so doing, a bar association or other person is merely assisting the court and is not bringing a proceeding in the nature of a litigated "case", to which there are two parties. It has been definitely decided that there are not two parties and that, as soon as a matter is called to the attention of the court, the bar association or other petitioner or informer drops out of the picture, and the matter is simply an inquiry by the court into the professional conduct of one of its officers. In conducting that inquiry, the court may seek and receive such assistance as it desires.

Such being the law as we understand it we respectfully suggest that the ordinary rules of appellate practice applicable to cases at law or in equity do not apply to disciplinary cases arising in either court as far as the interest of the public and the responsibility of the court is concerned. Such an inquiry is "not a criminal proceeding" (See *Matter of Ulmer*, 268 Mass. at page 392).

The responsibility of the Supreme Judicial Court in a disciplinary case seems in no sense lessened or restricted by the fact that a proceeding has taken place in the Superior Court. There is no statutory or other rule of practice to prevent a bar association committee or other person from filing an information, or a transcript of the proceedings in the Superior Court in the Supreme Judicial Court with a request that that court should make an original inquiry on its own responsibility making such use of the proceedings and findings in the Superior Court as the public interest may require. It does not seem to be a question of appeal or a question of exceptions when the matter is brought up on behalf of the public interest. There being no party except the respondent, there is no one to appeal on behalf of the public and it is hard to see how the Superior Court can, by its findings or action dismissing

a proceeding, affect in any way the continuing and direct responsibility of the Supreme Judicial Court in such a case.

We suggest that the Supreme Judicial Court is as free to consider the whole case and every aspect of it and to take further evidence if it sees fit in a case which has been heard in the Superior Court and subsequently called to the attention in any manner, however informal, of the Supreme Judicial Court, as it is in dealing with a report of a special commissioner in the course of the current investigation already referred to. Such matters are heard informally in chambers in the Federal District Court unless a public hearing is requested.

Accordingly, we respectfully suggest that the statements already quoted from the opinion in the *Matter of Sleeper* that

> "A proceeding for . . . disbarment . . . is at common law and not in equity"

and that

> "When in such proceeding questions are presented to this court respecting general or special findings of fact made by the trial court . . . the only matter for us to decide, even upon a full report of the evidence" is whether "the general or special findings made can be sustained on any reasonable view of the case as presented to the trial court"

seem inconsistent with the established law as to the nature of the proceeding and the direct responsibility of the Supreme Judicial Court for the character of the bar. In other words, such a proceeding does not seem to be accurately described as one either at law or in equity. Like an admission proceeding it is an "administrative" proceeding which does not fall within any class of litigation. It is a proceeding in which there is only one party brought before the court for a judicial inquiry in which the court seems bound by no technical rules, except those dictated by the fair judicial performance of its own duties and responsibilities to the public.

F. W. G.

TRIAL BY JURY OF SIX.

(Extracts from the Fifth Report of the Rhode Island Judicial Council in December, 1931, pp. 32-34.)

Colorado, Connecticut, Florida, Illinois, Michigan, New Jersey, New York, South Dakota, Utah, Virginia, and Wyoming are among the states now providing for trial by a jury of less than twelve. Obviously trial by a jury of less than twelve is not as novel as it seems to those accustomed to consider "jury" as synonymous with "twelve."

The constitution of Connecticut has the same provision as the constitution of Rhode Island, "The right of trial by jury shall remain inviolate." A statute in Connecticut provides as follows:—

> "Sec. 5628. Jury in suit before justice of the peace. When any action is pending before a justice of the peace, in which the matter in demand exceeds twenty dollars in amount or value, a jury of six shall be summoned to try the same, on motion of either party, made either before the return day, in which case it shall be supported by filing a written statement, signed by the adverse party or his attorney, that an issue of fact will be joined, or after an issue of fact has been joined; provided the party moving for a jury shall enter into a recognizance with surety to the adverse party, in such sum as the court shall order, conditioned for the payment of all costs in case final judgment shall be rendered against him."
>
> *General Statutes 1930, Vol. 2.*

"An earlier statute provided:

> "Sec. 1356. Either party may move for a jury to try said complaint, and on such motion, the court shall cause a jury of six to be drawn from the jury box of said town and summoned to try the same, provided the party moving for a jury shall enter into a recognizance, with surety, to the adverse party, in such sum as the court shall order, conditioned for the payment of all costs in case final judgment is rendered against him." (General Statutes 1888.)

"This statute was held constitutional.

> " 'The defendants thereupon requested that a jury of twelve might be summoned to try the issues of fact, claiming that the Constitution guaranteed that the right of trial by jury shall remain inviolate, and that before and at the time the Constitution of Connecticut was adopted, a defendant could not be deprived of his property unless upon the verdict of a jury of twelve. The court overruled this claim of the defendants, and the defendants duly excepted.'
>
> "There was no error in these rulings of the court. The provisions of General Statutes, Sec. 1356, here called in question, are valid and constitutional, and no objection can now be urged to them which has not already been considered and overruled in the decisions of this court. Curtis *v.* Gill, 34 Conn. 49; Guile *v.* Brown, 38 id. 237; LaCroix *v.* County Commissioners, 50 id. 321; Seeley *v.* Bridgeport, 53 id. 1."
>
> *Miller & Co.* vs. *Lampson,* 66 Conn. 432, 438.

"In view of this decision and the existence of the present statute providing for trial by a jury of six, there seems little question as to the validity of such a jury for the trial of small cases at least. Such juries were authorized at an early date. 1 Col. Rec. 118."

State vs. *Gannon,* et al, *75 Conn. 206, 227.*

"But whether constitutional or not it is probably inexpedient to require parties to submit to trial by a jury of six, but there can be no harm in offering parties a choice of trial by a jury of six. Civil cases are not uncommonly tried by less than a jury of twelve, by agreement of

the parties, and when a full panel is not available parties sometimes agreed to a trial by ten or eleven jurors. This is current practice in this State. Certainly if a party may waive trial by jury altogether he may waive trial by a jury of twelve and accept a jury of a less number, in both civil and criminal cases.

> "It follows that we must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing. In other words, an affirmative answer to the question certified logically requires the conclusion that a person charged with a *crime* punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by *any lesser number*, or by the court without a jury."
>
> *Patton* vs. *United States, 281 U. S. 276, 290.* See also *Realty Imp. Co.* vs. *Cons. Gas etc. Co., 156 Ind. 581, 586.*

"General Laws, [of Rhode Island] Chapter 176, provides for a trial jury of six persons at fire inquests, and if a jury of six is sufficient to judge and pass upon the matter of arson that number should be sufficient for the actual trial and determination of simple civil cases. Juries of six were authorized at an early date in this State. *1 Arnold History of R. I., Page 194, note. 2 R. I. Colonial Records, 258 (1669).*

"In Colorado the practice is described in a letter from F. D. Stackhouse, Clerk of the District Court, at Denver. Mr. Stackhouse writes:

> "Since 1876, a jury (cause) in civil actions could be tried to a jury of six. . . . In 1891, the Code was again amended and provided, ' . . . The jury shall consist of six persons, unless the parties agree to a smaller number, not less than three; Provided, either party may have the right to increase the number of jurors to twelve by depositing with the Clerk of said Court an additional jury fee sufficient to pay the said additional jurors for one day's service, and there shall be taxed as costs, a like sum for every day thereafter consumed in such trial, to be taxed to the party calling said additional jurors. . . . The provisions reference challenge remain the same, each party being entitled to four peremptory challenges. . . . No civil cases are tried in the District Court to a jury of less than six, except divorce cases, and these may be tried to a jury of three under a special provision of the statutes pertaining to divorce. A jury of three is usually called in the Justice of the Peace Court. The trial by jury of six in civil cases is favorably regarded by the Court and members of the Bar. As to the reason for the adoption of trial by jury of six in Civil Actions, we are not advised, and it is impossible to state just what argument was originally advanced. As stated in paragraph one herein, a jury of twelve is allowed if desired. The Statutes provide, 'A jury fee of $5.00 shall be taxed as part of the costs of the suit in each cause tried by jury, . . .' Rule XI of the District Court provides 'Sec. 3. In all cases tried to a jury of not more than six jurors, the plaintiff shall pay a jury fee of five dollars, unless otherwise ordered by the Court. In case either party increases the number of jurors to twelve, as stated in paragraph one herein, such party must deposit with the Clerk of the Court a jury fee sufficient to pay the said additional jurors for one day's service, and there shall be taxed as costs, a like sum for every day thereafter consumed in such trial, to be taxed to the party calling said additional jurors. . . .' Civil cases may be tried without a jury and Section 2 of Rule XI covers the setting of a cause for trial. As to the approximate number of cases tried to the Court, jury of six and jury of twelve, we believe that the following is a fair estimate:

Trials to Court	.851
Trials to Jury of Six	.116
Trials to Jury of Twelve	.032

This percentage is derived by taking 155 cases.

For a jury of six, the jury fee is $5.00; for a jury of twelve the first six jurors' fee is $5.00, and for the additional six a fee of $18.00, making a total of $23.00 for the first day and $18.00 for each additional day the extra six are engaged in the trial of the case. If a jury of six is used during the entire trial of the cause, the original fee of $5.00 fully pays the fee for the entire period of trial. As stated in paragraph one herein, each side is entitled to four peremptory challenges. These challenges are in addition to any excused for cause. . . . It is the opinion of this office that trial by a jury of six, has of course, lessened the cost of jury trials to the litigants, and consequently, reduced the revenue derived therefrom. As it will be noted that most cases tried to a jury is to a jury of six. Since the increased fee for a jury of twelve went into effect in 1929, trials to a jury of twelve have greatly fallen off and very few causes are tried to a jury of twelve."

In Florida, a letter to the Council, from Hon. Paul D. Barns, Judge of the Circuit Court, at Miami, under date of October 31, 1931 contains the following:

"Answering your letter of October 24, seriatim, I beg to advise as follows:

"A jury of six in the trial of cases less than capital, in both civil and criminal cases, has been in force in this state for over fifty years. It is favorably regarded by the court as well as by members of the bar. . . . Trial by jury by twelve is not allowed. The law provides for six, and six it is, unless the parties agree upon a less number, which occasionally happens. Cases may be tried without a jury, by consent of all parties concerned. . . . A party is not required to pay a jury fee for trial except upon demanding same in a case of trial before a justice of the peace, whose jurisdiction is limited to $100; and in certain other cases before a county judge, whose jurisdiction is very limited. The party has three peremptory challenges to a jury of six, and as many for cause as there are causes, and ten peremptory challenges in capital cases, and an unlimited number for cause. Trial by jury of six, in my opinion, is far less expensive than a jury of twelve, and, I may add, is very satisfactory here."

The Judicial Council of Virginia on October 27, 1931 replied as follows, relative to the practice in Virginia.

"Civil cases may be tried by a jury of either five or seven, or the court may allow a special jury of twelve. . . . Trial by juries of five or seven has been in effect since December 10, 1903. The change has been favorably regarded by the courts and the bar. It was probably adopted in the interest of economy and expedition, and has accomplished that purpose. The court may allow a special jury of twelve if requested by either party. A trial by jury may be waived by the parties. It is impossible to say what proportion of cases are tried without a jury, or with juries of five, seven or twelve. The proportion varies in different sections of the State, according to the preference of the court or bar. No jury fee is charged against a party when the case is tried by a jury of five or seven, but the court may in its discretion tax the cost of a special jury (12) against either plaintiff or defendant. With a jury of twelve each side is allowed two challenges; with a jury of seven, one each; with a jury of five none. Reduction of the number of jurors has resulted in reduction of the cost of jury trials to the State."

MORE ABOUT AIR LAW.

In the MASSACHUSETTS LAW QUARTERLY for May, 1928 (p. 23), we discussed briefly the question, "How Far Have Men the Flying Rights of Birds?" The case which was then pending in Worcester County was subsequently decided in the Supreme Judicial Court in an opinion by Chief Justice Rugg, which was the first, and probably will continue as the leading, opinion in the country upon the issues before the court. As the sound development of air law is one of rapidly growing importance, the recent discussion by Professor Bohlen is here reprinted in order to focus attention on the problems.

F. W. G.

SURFACE OWNERS AND THE RIGHT OF FLIGHT.

PRACTICAL REASONS FOR PREFERRING VIEW OF THE MASSACHUSETTS COURT.

By FRANCIS H. BOHLEN,
Professor of Law, University of Pennsylvania.

(Reprinted from the American Bar Association Journal for August, 1932.)

The invention of the aeroplane and the rapid development of aviation as a recognized means of transportation has made acute the previously academic problem of determining the extent to which the ownership of the surface of the land carries with it the ownership of the superincumbent air space. It has become a matter of immediate and pressing necessity to find some method by which aviation may be lawfully carried on without unduly interfering with the legitimate interests of the surface owner. While there had been many discussions by essayists and text writers, no American appellate court had, until two years ago, been required to deal with these problems. Since then two appellate courts of high authority have recognized the lawfulness of flight without the consent of the surface owner. However, the conditions under which planes may be lawfully flown and the bases upon which the legality of flight is sustained are essentially different in the two cases.

In *Smith* v. *New England Aircraft Corp.*, 270 Mass. 511, 170 N. E. 385 (1930), the Supreme Judicial Court of Massachusetts adopted the view that "private ownership of air space extends to all reasonable heights above underlying land." A strong opinion was expressed that a State in the exercise of its police power or the United States in the exercise of its power to regulate interstate commerce might grant a privilege of flight over land at heights at which and under conditions under which the flight does not unreasonably interfere with the rights of the surface owner. The

flight under 500 feet, the altitude at which the Massachusetts statute permitted flying over privately owned land while taking off and landing, was held to be a trespass, but the injunction was refused in accordance with the Massachusetts practice, because the flight although a trespass was not shown to be injurious to the surface owner's enjoyment of his land.

In *Swetland* v. *Curtiss Airport Co.*, 41 Fed. 2nd. 929 (1930), Hahn, District Judge, refused to enjoin the operation of the airport because of the noise or glaring lights which were likely to be incidental to the subsequent growth and full use of the airport when completed. However, he did enjoin the flight below 500 feet, which was the altitude at which flight was permitted over land, other than that in congested parts of cities, towns or settlements, by the regulations of the Department of Commerce which had been adopted by a statute of the State of Ohio. In all essential particulars the opinion of Hahn, J., is in substantial accord with that of Rugg, C. J., in *Smith* v. *the New England Aircraft Corporation.* The Circuit Court of Appeals of the Second Circuit, however, so modified the injunction as to enjoin the defendant from operating the airport as then located because its normal operation had been shown to involve much annoyance to the neighboring owner from the noises made by the normal low flying over his land and by the taking off and landing of aeroplanes on the field, but deleted so much of the injunction as forbade the flying over the plaintiff's land at less than 500 feet. The principal opinion was delivered by Moorman, Circuit Judge. He repudiated the traditional view that an owner of the surface also owns any part of the air space above it merely because he owns the surface. According to Judge Moorman, the surface owner has only a right to occupy any part of the air above his land and acquires possession and ownership by so doing. Thus his ownership of the air extends to only so much of it as he has reduced to possession by use or building, although there is a curious remnant of ownership sufficient to support his injunction against persistent intrusions upon that part of the air space which may become usable in the future, if such intrusions are so continuous that they may ripen into an easement.[1] Unless the flight is within the occupied air space or is of such a character as to be likely to create an easement interfering with the future use of the potentially usable air space, the surface owner has no remedy, except against flights which are so conducted as to unreasonably interfere with the owner's enjoyment of the surface and the appropriated air space and thus become a nuisance. Not only this, but to be a nuisance to residential property the

[1] Hickenlooper, J., concurred in result but refused to concur in "that portion (of the majority opinion) which seems to me to create a distinction between flights in the upper and lower strata founded upon reasonable expectation of use." It will be noted that of the ten appellate judges who considered the questions in these two cases only two regarded the surface owner's right of possession as limited to the air space which he had appropriated by occupancy.

flight must make the surface physically uncomfortable for residential use. Furthermore, the fact that the flight is at an altitude forbidden by statute does not make the flight a nuisance for "in our view that regulation" (forbidding flight below 500 feet) "does not determine the rights of the surface owner, either as to trespass or nuisance." In these last two particulars Judge Moorman's opinion seems open to serious criticism. In determining the existence of a nuisance he lays undue stress upon the fact that the plaintiff's land was made physically uncomfortable for residential use. If by this he meant to imply that physical discomfort was necessary to constitute a nuisance, his concept of the ambit of nuisance is far more restricted than the cases warrant. After all the essence of nuisance to land is unreasonable interference with the owner's enjoyment of life localized in the particular land. It should be, and in many cases is, recognized as immaterial that the unreasonable discomfort comes from the apprehension of danger or other normal mental reaction rather than from smoke, dust or odors which cause physical discomfort. A low flying aeroplane is obnoxious to the normal landowner not merely because he feels it is an outrage on what he assumes to be his proprietorship of the air, but because he feels endangered by it, a feeling which experience has shown to have at least some justification. There are innumerable cases in which the nuisance character of the defendant's conduct lies in the mental discomfort which comes from similar fears of possible future injury. The storage of dynamite in too close propinquity to residential land is a nuisance, yet it does not make the land physically uncomfortable; the fear of possible danger in the event of its explosion is enough. The second criticism is more serious. He cites no authorities in support of his view that the regulation which prohibited flight under 500 feet did not determine the rights of the surface owner either as to trespass or nuisance. His statement is contra to innumerable cases in which statutes or even ordinances, enacted in whole or in part to protect the private interests of individual citizens and not merely to effectuate some purely public policy or purpose, have been held to create a private right in those for whose protection the enactment was passed.[2] It can hardly be contended that the aviation rules adopted by the State of Ohio were not intended to protect the interests of the owners and occupiers of the surface land. The very purpose of requiring flights to be made at a reasonable altitude is to give the maneuvering room necessary to enable planes to make a "rea-

[2] See *Exner* v. *The Sherman Construction Co.*, 54 Fed. 2nd 510 (C. C. A. 2nd Circuit 1931) in which there is a statement by Augustus Hand, J., to the effect that where an ordinance forbade the storage of dynamite within a stated distance from inhabited buildings the storage was a nuisance to all persons owning or occupying buildings within the protected area and could be enjoined by them as such. This was dictum since the plaintiff's property was situated outside of the protected zone. Swan, J., however, sustained the plaintiff's right to recover on the ground that the storage of dynamite in violation of the ordinance was actionable as a nuisance even by those who owned property outside the protected zone and who, therefore, were not within the class for whose peculiar protection the ordinance was passed.

sonably safe emergency landing," (as is required when flight is over a congested district) and so to prevent their crashing on the surface to the very probable injury of life and property thereon, and, in addition, to protect the occupiers of the surface against the discomfort and terror inseparable from low flights.

It is obviously necessary that some method shall be found whereby a fair adjustment may be made between the legitimate interests of aviation and the public which it serves and the traditional interests of the surface owner. It is unthinkable that a churlish landowner of a large tract of land should be able to block air communication between important centers of population by injunction or that an avaricious owner could utilize his right in the air above his land as a means of blackmailing an aviation company into paying an exorbitant price for his consent to the passage of its planes. The two cases above discussed present two fundamentally different methods by which flight by aeroplanes may be legalized. The question is to determine which of the two methods is preferable. The Smith case recognizes the traditional right of ownership *usque ad coelum* but makes it subject to a legislatively created or defined privilege of such passage as is necessary to secure the public interest in transportation by air. The decision of the Circuit Court of Appeals in the Swetland case substantially denies all right in the unoccupied air space, such air space being neutral territory in which all flights are permissible which do not constitute a nuisance to the enjoyment of the surface. In the Swetland case Judge Moorman speaks of the traditional concept of ownership "to high heaven," as being the creature of a maxim itself imbedded into the body of the law by certain early cases. It may be doubted whether this concept is the creature of a maxim. It is more nearly true that the maxim, if it can be so called, is merely a convenient generalization of a concept so ancient as to form one of the traditional assumptions of all landowners. Like all generalizations it may prove too broad to fit the needs of modern life and may, therefore, require modification or abandonment. It seems clear that one or the other is necessary. Which shall it be? It is submitted that, if satisfactory results can be obtained by modification, it would be unwise to abandon altogether a concept which is no longer merely legal but which is shared by the great majority, if not all, of those who own surface land. It is further submitted that the results attained by so modifying the broad generalizations as to make the ownership of the air subject to a privilege of passage by aeroplanes will not only be as satisfactory a solution of the problem but a far more workable and fair one. Ample analogies can be found for such a privilege. The right of navigating a stream, the bed of which is entirely within the boundaries of privately owned land, affords an analogy so close as to be substantially complete. Almost as close an analogy is furnished by the right of detour over private land when a public highway is impassable. Both of these privileges are based upon

the public interest in intercommunication between locality and locality, the same public interest which alone can be successfully urged as requiring the privilege of flight. There can certainly be no greater constitutional objection to the recognition of a privilege which is to this extent in derogation of the surface owner's rights in the air space above it than to the complete denial of all ownership in the unoccupied air.

Apart from this, however, there are several very practical reasons for preferring the Massachusetts method. In the first place only such flights as are in the furtherance of the public interest in air transportation are made lawful, whereas under the Swetland case all sorts and kinds of flights for purely private purposes would be legalized unless the owner could show that they made the enjoyment of his land physically uncomfortable. Yet no public interest is served by stunt flying, flying for advertising purposes or for the production of moving pictures. There is no reason why the surface owner's traditionally recognized interests should be made subordinate to these purely private enterprises. If such flights are desired, the consent of the owner should be obtained and if necessary paid for. There is no greater reason to allow the air above one's land to be exploited for private gain than to permit a showboat to moor for exhibition purposes in a navigable stream within private boundaries.

Again under the Massachusetts technique the aviator has the burden of proving that his flight is privileged. Where, as is the case in all but a very few states, there is legislation which fixes the legal height of flight, this puts the burden of proof upon the only person who has any ability to ascertain with even approximate accuracy the height at which the particular flight or flights are made. Every aeroplane is equipped with instruments which tell with reasonable accuracy the height of the plane at every moment. The aviator can know at what height he is flying over each particular piece of land and since cases are not litigated unless the flight is persistent or near an airport, the aviator's attention can readily be centered upon the height at which he flies over the area in question. On the other hand, the surface owner can at best make a rough estimate as to the height at which a plane passes over his land. All other things being equal, the burden of proving any legally operative fact is best placed upon him who has the exclusive or greatly superior ability to prove it.

Finally, the Massachusetts method is likely to have the following highly important advantage. Unless history fails to repeat itself, it is safe to predict that the aviation interests, highly organized and keenly conscious of their own peculiar needs and interests as they are, will exert a constant pressure upon legislatures, boards or commissions, to whom the regulation of aviation is committed, to obtain rules and regulations which will permit them the utmost latitude of profitable flight. Against this highly organized group the unorganized body of landowners will be comparatively helpless.

Today organization and not numbers means political power and governmental favors. Against such a chance the surface owner must look to the courts for protection. If the surface owner is recognized as being also the owner of the air, subject only to a privilege of passage by aeroplanes, the question of the reasonable character of the privilege granted by the legislature, or by an aeronautical board as its delegate, is more readily presented in a form likely to secure the legitimate interests of the surface owners. Frankly the writer has no fear that either legislatures or courts will not be sufficiently sensitive to the legitimate needs of aviation. His fear is that in their enthusiasm for this new method of transportation legislatures and boards may overlook the equally legitimate interests of surface owners.

In one particular aviation presents a peculiar problem. Except for an almost negligible minority aeroplanes today require a very considerable space to attain an altitude at which they can be flown without mental or physical discomfort to adjacent residential property. It is certain that if 500 feet is fixed as a minimum altitude the area of airports must be very great, and since airports must be within convenient distance from the cities which they serve, it may be very difficult to obtain so large a tract. Here again the Massachusetts court and the District Court in the Swetland case indicate a different solution of the difficulty from that which is, perhaps vaguely, implied in the opinion of the Circuit Court of Appeals. In the District Court, Hahn, J., 41 Fed. 2nd. 942, citing *Smith* v. *New England Aircraft Company* said: "Until the progress of aerial navigation has reached a point of development where airplanes can readily reach an altitude of 500 feet before crossing the property of an adjoining owner, where such crossing involves an unreasonable interference with property rights or with effective possession, owners of airports must acquire landing fields of sufficient area to accomplish that result. In such instances, to fly over the lands of an adjoining owner at lower altitudes, the owners of airports must secure the consent of adjoining property owners, or acquire such right by condemnation when appropriate enabling statutes are enacted." On the other hand, Moorman, J., appears to suggest that if the airport company could not find another site on which their operations would not unreasonably interfere with the enjoyment of the neighboring land, the adjacent landowners might have to submit to great annoyance in the interest of the public value of aviation. Since, however, it was shown that the defendants had acquired another site the court said, "Considering, therefore, the balance of convenience the defendants are not entitled to use the property as they now contemplate." It may be that Judge Moorman did not intend any such implication as that which has been drawn from his language. If, however, the implication is a fair one, it is certainly extraordinary to recognize a right of expropriation without compensation in an activity which has not yet been recognized as of sufficient

public importance to warrant the conferring upon it of the right of eminent domain, under which the necessary air rights could be condemned, but only upon the payment of their value.

At all events one thing seems certain, "Who shall decide when doctors disagree?" When courts are in fundamental disagreement in a matter of immense public importance it is for legislation to decide between them and, in a matter dealing with a means of transportation by which thousands of miles are covered in a day, it is essential that the legislation shall be uniform, at least throughout the United States. Two committees are charged with the task of preparing universal aviation laws. One such act has already been prepared by the Aeronautical Committee of the Commissioners for Uniform State laws and has been enacted in several states. A committee of the American Bar Association is preparing a similar act of which a tentative draft was presented at the 1931 meeting of the Association. It, in substance, embodied the view subsequently expressed in Judge Moorman's opinion. To many of us it seemed to give no adequate protection to the legitimate interests of the surface owners. The committee is still at work upon the final draft. There is reason to hope that it will be materially changed and will secure a freedom of aviation sufficient to satisfy the public need of air transportation while at the same time adequately guarding the legitimate interests of the surface owner. It is to be hoped that the section of the act prepared by the Uniform State Commissioners, which recognized the right of the surface owner to the air space above it, will be inserted in the committee's final draft and that the section legalizing flight over privately owned land shall be so drafted as to make lawful only passage through the air space and not all flight for any purpose. Furthermore such passage should be made lawful only if it is at the altitude and under regulations promulgated by the state aviation act or by the state aeronautical authorities and if so conducted as not to unreasonably interfere with the landowner's enjoyment of the surface and the air above him and not to be unreasonably dangerous to persons and property thereon or to seriously offset the value of the land. If the act is so framed it will adopt the views of the Massachusetts Supreme Judicial Court and of Judge Hahn in the District Court of the United States. Even though the omitted section be not inserted, the fact that the Act would make flight legal under the conditions named would indicate that a privilege of passage in derogation of the surface owner's exclusive possession of the air is being conferred, in analogy to the privilege of navigating a navigable stream upon private property. However, in the writer's opinion it is important that that which would thus be implicit should be made explicit by the insertion of this omitted section. If this is done there can be no doubt as to the precise basis upon which flying is permitted. The danger that the courts of different jurisdictions will take different positions on the matter will be largely if not entirely eliminated.

The right of flight will be obviously a privilege and as such those who seek its protection will be required to prove themselves within its terms. An act so drafted will give to each state the power to determine the conditions under which aeroplanes may be lawfully flown; a power which, however, will be susceptible to scrutiny by the courts to see that the interest in air transportation is not given an undue preference to the interest of the far more numerous landowners in having their occupancy of the surface preserved not only from physical discomfort caused by noise, odors and dust but also from the mental discomfort and normal uneasiness too frequently caused by inconsiderate airmen flying at unnecessarily low altitudes over residential property.

RES IPSA LOQUITUR.

A Dialogue.

Says counsel to the court,—This is an airplane accident—*res ipsa loquitur*.

Says the court to counsel,—We do not yet understand that language. Stage coaches may testify here and ice and railroad trains but we would rather listen to a witness. We can hear a right wing motor go dead but we can not be sure we understand what it is saying.

Wilson v. *Colonial Air Transport, 1932 Adv. Sheets 443.*

R. W. H.

The foregoing communication to the editor suggests the reprinting to provoke discussion of the following

Extracts from Opinion in Wilson v. Colonial Air Transport Inc. (1932 Adv. Sheets 443 at pp. 445-448).

"At the close of the trial the plaintiff duly made the following requests: 1. That the testimony of Walter Wilson as to how the accident occurred constituted a case to which the doctrine *res ipsa loquitur* applies. 2. Upon the plaintiff having proved a case to which the doctrine *res ipsa loquitur* applied, the burden of proof then rested upon the defendant to rebut the legal inference of negligence. 3. The evidence produced by the defendants in no way explained how the accident occurred. . . . 5. That the plaintiff has established a *res ipsa loquitur* case, and the defendant must explain the cause of the accident in order to rebut the presumption of negligence. 6. The evidence of the defendants went no further than to explain the conduct of the pilot. 7. That the doctrine of *res ipsa loquitur* applies to the facts of this case." The judge denied these requests but allowed the following: "4. The evidence of the de-

fendants did not explain why one of the motors failed to function within a few seconds after leaving the ground."

"The judge found the following facts: 'I find that the defendant was not negligent in the management or operation of airship involved in accident. I find that prior to flight defendant's pilot tested plane and found it in good working order.' There was a finding for the defendant. . . .

"The elimination of the facts in controversy which resulted from the finding for the defendant leaves for determination the issue whether a passenger for hire in a privately operated airplane can invoke the rule of *res ipsa loquitur* should the right wing motor go dead and the right side of the plane tip, a few seconds after leaving the ground, with the result that, though the pilot made frantic efforts to right the plane, it was steered toward the water and immediately made a nose dive into the water. It is assumed that the pilot of an airplane, like the driver of an automobile, is charged with a duty toward a passenger for hire in such plane commensurate with the nature of the instrument employed and with the duty imposed on him by law. It is settled that the degree of care of a common carrier for hire is measurably greater than the law imposes on a private carrier for hire, and it would seem that proof of the facts and surrounding circumstances need only be slight in order to set up the presumptive rule of negligence and call upon the defendant for an explanation; and that in either case negligence will not be presumed from the mere happening of an accident. *DiLeo* v. *Eastern Massachusetts Street Railway,* 255 Mass. 140. The rules of law relating to the operation of aircraft, in the absence of statute, in general are rules relating to negligence and nuisance, and are not distinguishable from those which relate to the operation of vehicles, perhaps, more closely, to motor vehicles on land. In this Commonwealth at present there is no statute specifically applicable to the issue of negligence in the operation of aircraft, and the ordinary rules of negligence and due care obtain. See St. 1922, c. 534, as amended by St. 1928, c. 388.

"The principle of *res ipsa loquitur* only applies where the direct cause of the accident and so much of the surrounding circumstances as were essential to its occurrence were within the sole control of the defendants or of their servants. *Reardon* v. *Boston Elevated Railway,* 247 Mass. 124. It is to be noted that the presumption raised in favor of the plaintiff by the application of the *res ipsa loquitur* doctrine is one of evidence and not of substance, and that the burden of proof remains during the trial upon the plaintiff. *Carroll* v. *Boston Elevated Railway,* 200 Mass. 527, 536. *Gilchrist* v. *Boston Elevated Railway,* 272 Mass. 346, 351–352. It is also to be observed that the doctrine will not be applied if there is any other reasonable or probable cause from which it might be inferred there was no negligence at all; nor does it apply in any instance when the agency causing the accident is not under the sole and exclusive control of the person sought to be charged with the injury. *Stangy*

v. *Boston Elevated Railway*, 220 Mass. 414, 416. *Reardon* v. *Boston Elevated Railway*, 247 Mass. 124, 126. *DiLeo* v. *Eastern Massachusetts Street Railway*, 255 Mass. 140, 143.

"There is nothing in the record to indicate by whom the airplane was inspected. It does not appear that the inspectors, to whom the pilot, according to his testimony, turned over the airplane on his arrival and from whom he received it a few minutes before he took off, were employed by the defendant. They may have been servants of an independent contractor or of one conducting an independent business, to whom as mechanics skilled in aircraft the defendant in the exercise of a high degree of care committed the inspection and repair of the airplane. There is at present no common knowledge of which courts can take cognizance concerning the customs or usual practice of air transport companies as to operation, inspection and repair of their airplanes. There must be evidence. We are not as yet in respect to the operation, care and characteristics of aircraft, in a position where the doctrine of cases like *Ware* v. *Gay*, 11 Pick. 106, as to a stagecoach, *O'Neil* v. *Toomey*, 218 Mass. 242, as to the qualities of ice, or *Gilchrist* v. *Boston Elevated Railway*, 272 Mass. 346, as to trolley cars or steam railroad trains, can be applied. The decision of cases of that nature rests upon facts constituting a part of a widespread fund of information. No ruling of that character could be made upon the meager facts here shown. As the judge found as a fact on the evidence that the defendant was not negligent in the management or operation of the airship involved in the accident, it follows that the plaintiff was not entitled to have given any of the requests numbered 1, 2, 3, 5, 6, and 7.

"The judge properly found for the defendant, and the entry 'Report dismissed' must be

Affirmed."

EDITORIAL NOTE.

This opinion suggests serious questions for future consideration, and as it appears from Professor Bohlen's article that the Massachusetts Court has taken a leading position in the development of air law, we call attention to some of these questions to provoke thinking in advance of further litigation.

The first question is whether or not the use of Latin phrases, or maxims, in law-writing whether by judges or others today is an aid to clear thinking. Chief Judge Bond, of the Maryland Court of Appeals, in a paper reprinted in this number on the history of the judicial use of the words *res ipsa loquitur*, thinks that it is not. We are inclined to agree with him. *Res ipsa loquitur*, as Chief Judge Bond points out, may vary in its meaning according to the circumstances in which it is used. We doubt its value as an aid to

clear thinking because the courts, having used it in some cases, find it necessary, not only to translate, but to further explain it in other cases, as shown by the following quotation of Section 1253 of Norman & Houghton's "Massachusetts Trial Evidence," 2nd Ed. p. 634.

> "*§1253. Res ipsa loquitur—Explained.*
>
> As to the extent of the presumption in this class of cases the court says: 'In some of our more recent decisions, the presumption standing alone is stated to be sufficient to support an inference of negligence, unless the defendant, by going forward with the evidence, offers what the jury may find to be an adequate or satisfactory explanation . . . But whichever form of expression may be chosen, *prima facie* evidence in legal intendment means evidence which if unrebutted or unexplained is sufficient to maintain the proposition and warrant the conclusion to support which it is introduced.'* 'What is meant by *res ipsa loquitur* is, that the jury are warranted in finding, from their knowledge as men of the world, that such accidents usually do not happen except through the defendant's fault, and therefore in inferring that this one happened through the defendant's fault unless otherwise explained.' "**

In the Wilson Case, the trial judge decided that the happening of this air accident a few seconds after the plane left the ground, without further evidence as to the cause of the accident, was not enough as a matter of law to raise a legal inference of negligence to shift the burden of going forward to the defendant, as suggested in the plaintiff's requests for rulings. The court says, "No ruling of that character could be made on the meagre facts here shown," and appears to base this decision on lack of information in the community and in the court in regard to the mechanics of flying.

Nothing is said about "assumption of risk" by a passenger who ventures to travel by air. The general statement that the rules of law relating to the operation of aircraft are the rules relating to negligence and nuisance and "are not distinguishable from those which relate to the operation of vehicles on land . . . in the absence of statute" does not illuminate the practical problem which the courts must face in dealing with the order of proof as to air accidents in general of every variety other than those which involve

*Carroll v. Boston Elevated Ry. Co., 200 Mass. 527, 536.

**Pinney v. Hall, 156 Mass. 225, 226. See Minihan v. Boston Elevated Ry. Co., 197 Mass. 367.

passengers. Even as to a passenger the application of the general rule by the trial judge does not seem to us convincing. The fact that the opportunities for observation by pedestrians or others of what goes on in the air and the comparative lack of other evidence which surround land accidents is not discussed in the opinion. This suggests the question whether, if the trial judge had ruled that in view of the difference between evidential conditions of the air and the land, the happening of the accident did call for explanatory evidence by the defendant, his decision would not have been sustained as sound.

We assume that the rule of proof adopted and approved in this case is limited to passenger cases. Under the Massachusetts law of nuisance and negligence, it appears, as pointed out by Professor Bohlen in the article printed in this number, that in Massachusetts a man who flies below the statutory limit of 500 feet is a trespasser on private property and presumably is a nuisance on public property like a highway or a common or other property upon which the public is invited or has a right to be. Accordingly, we assume that if a person or property on the highway or other property, public or private, is damaged from the air, the happening of the accident is sufficient to throw the burden of explanation on the shoulders of the defendant to rebut the presumption of negligence.

Whether the doctrine of absolute liability for damage caused by wild animals or by dangerous substances which escape, as in the case of *Rylands* v. *Fletcher,* is applicable to damage caused by aircraft under any circumstances, we do not know, but that aircraft operation should involve a somewhat greater burden in the order of proof in cases in which persons or property are damaged from above seems to us only just, whatever may be the rules of proof when both the plaintiff and the defendant are in the air when the accident occurs.

"The knowledge of ordinary affairs" referred to in *O'Neil* v. *Toomey* certainly seems to include knowledge as a matter of commonsense that air conditions are sufficiently different from land conditions to call for specific consideration in legal reasoning as to rules of proof in air cases between landsmen and airmen in general.

While there is nothing in the Wilson opinion which seems to conflict with these views, they are suggested by some of the general statements above quoted as to the law of negligence and nuisance,—for instance, a pedestrian who is injured on the highway by an auto-

mobile is expected to show negligence of the operator as part of the plaintiff's case, but we find it difficult to believe that a pedestrian on the highway who is knocked down by a flier would be subject to the same rule of proof. The discriminating study of "*Res Ipsa Loquitur*" of the doctrine of *Rylands* v. *Fletcher* and of the common law rule about "cattle damage" in the various editions of Sir John Salmond's "Law of Torts" may well be studied in this connection. The seventh edition appeared in 1928.

In Aron's "Notes on Proof" recently published, with an introduction by Judge Crane of the New York Court of Appeals, appears the following suggestive paragraph:

> "*Res ipsa loquitur* states an indisputable principle, but one extremely dangerous and difficult in application. It raises a fine distinction as to burden of proof. Because the thing speaks for itself, does it prove itself? Such is not the principle involved, and the maxim has nothing to do with self-proof, autoptic preference or real evidence. It is merely a rule of expedition, which enables the tribunal to come swiftly to the end of the matter by requiring an explanation or justification by the party responsible for the condition, to which the maxim is applied. Ordinarily the term is used in actions for negligence, but may have a proper application where contractual relations are involved. The most that can ordinarily be expected from the operation of this euphonious and misleading maxim is that it serves to make a *prima facie* case against a party otherwise shown to have been responsible for the condition." (p. 61.)

Such rules as those of absolute liability for the escape of dangerous substances as in *Rylands* v. *Fletcher*, or the common law liability for cattle damage, are not rules of evidence or of proof, but part of the substantive law of torts. The substantive law of torts arising from the use of the air for transportation, advertising "stunts" and other purposes with the incidental rules of liability are still in the course of judicial and statutory development. The less Latin used in the reasoning process the better.

F. W. G.

RES IPSA LOQUITUR.*

(Reprint of a pamphlet received some years ago from Hon. Carroll T. Bond, Chief Judge of the Maryland Court of Appeals.)

The introduction of Latin expressions into the language of the law has now, doubtless, ceased forever. For nearly seven centuries, from the time of the Norman Conquest until 1731, Latin was the

*The material of an old paper (66 Central Law Journal, 386), worked over with some notes which have accumulated since that paper was written.

official language of the law, or, at least, the language of all writs, records, judgments, patents and charters, all the most solemn actions of the law. For many centuries, too, it was the universal language of the church; and until well along in the seventeenth century was the universal language of learning in Europe. A large part of the school teaching in England, as elsewhere, was in Latin. Many text books were written in it. Scholars like Erasmus wrote exclusively in it; and it was in Latin that More wrote his Utopia and Bacon all his philosophical works. And the Essays, by which, perhaps, Bacon now chiefly survives, and which he said he counted but as the recreations of his other studies, he caused to be translated into Latin in order, "that the Latin volume might last as long as books last." "For these modern languages," he said, "will at one time or other play the bankrupt with books." Milton, up to about 1640, his thirty-second year, was distinguished as a Latin writer. Down into the eighteenth century men strove to excel in Latin verse. And all this was written for readers. So the generations of lawyers who passed down the literature of the law of England sprinkled with such phrases as *nisi prius, res gestae, res inter alois acta, ex post facto, ex parte, ejusdem generis,* and *respondeat superior,* did much of their thinking in Latin and found clear, natural expression of their thoughts in its phrases. Latin expressions had for them about as much meaning as expressions in their own vernacular.

But the time has come when lawyers know not Latin. That is true of American lawyers, at least. In England judges and barristers may still dispute on a Latin phrase from familiarity with the meaning of the words, as, for instance, when Lord Dunedin, in Admiralty Commissioners v. S. S. Valeria [1922], 2 A. C. 242, 248, said, "I cannot refrain from a slight criticism upon the use of the phrase *restitutio in integrum.* * * * I do not think it can be properly applied to questions of tort; and the illustration I give is a simple one. If by somebody's fault I lose my leg and am paid damages, can anyone in his senses say I have had *restitutio in integrum?*" The twilight of the Roman gods is longer in England. To lawyers unfamiliar with Latin, the words of such phrases themselves lack definite meaning, and their commonplace significance being unregarded the phrases are likely to stand as narrowed professional terms, not clearly conceived. And sometimes there is a tendency to attribute to them a mystical import and an uncertain consequence that may be troublesome.

The Latin expression *res ipsa loquitur* frequently made use of nowadays in the law of negligence has had a career which illustrates this tendency. It is a simple statement of the logical effect of evidence at hand in the light of ordinary experience, yet courts repeatedly find it necessary to define the expression, and the principle it has been used to express; and still it is cited and applied in a manner which shows misconception of it. An outline of its career may assist in keeping it from transgression. The expression, slightly varied in form, was a familiar one among Greek and Roman writers, and is frequently met with in the writings of the mediæval church fathers and of later Latinists. It was probably a common usage as far back as men found it convenient to argue that a conclusion was sufficiently well founded without further evidence, that the circumstances or objects exhibited spoke for themselves. . . .

The Latin word *res* is one of wide general significance, in many of its uses standing in much the same position in its language as the word "thing" does in English. It may mean object, matter, condition, circumstances, affair, and almost any subject of reference. It was commonly strengthened of old by the addition of *ipsa*, and the combination *res ipsa* is a very familiar turn of phrase in Latin writings. . . .

Cicero seems to have had it on his tongue when he prepared his oration in defence of Milo. Arguing in Section 53 that it was unlikely that Milo had waylaid Clodius, to kill him, he said, "The circumstances, O judges, speak for themselves; circumstances which are always of the greatest value: *Res loquitur ipsa, judices, quae semper valet plurimum.*" . . . And again, in Section 66, he told that Milo, to disprove a charge that he carried arms concealed about him in the Senate, had bared himself in that most sacred temple, since the life of so good a citizen and man could not procure him credit, so that while he remained silent his condition might speak for itself: *ut eo tacente, res ipsa loqueretur.*" . . . *Res ipsa loquitur* may be found also in Seneca (de Beneficiis, 2, 11, 6), Tertullian (de Pud. 5), and in the writings of Cyprian, St. Jerome and others. Cyprian, in Epist. ad Cyprianum, 30, 2, has *res ipsa loquitur et clamat.* . . . *Res ipsa indicat* occurs in Terence (Eunuchus, 705); *res ipsa declarat* in Guelbrotus; *res ipsa clamat* in Phædrus and the writings of Abelard. And Heloise, also, in the beginning of the twelfth century, wrote to Abelard (ep. 2, 178, 183): "*res ipsa clamat.*"

An early appearance of the expression in the reports of English

cases was that in Roberts v. Trenayne, Cro. Jac. 508 (1614). In that case, one on usury, a verdict was rendered without a finding that the agreement by which the interest was charged was corrupt, but there was an excessive charge made on the face of the instrument, and on this the report says: "And the case of Higgins v. Mervin was cited to be adjudged, that if the corrupt agreement be not expressed in the verdict, and the matter is apparent to the court to be usury, there the jury need not to show that it was corruptly, for *res ipsa loquitur;* otherwise it is if it be but implied." The same use, quoting from Roberts v. Trenayne, may be noticed in Ord's Essay on the Law of Usury (3 ed., Hartford, Conn., 1809) 88. It was used in the decision of Bank of U. S. v. Waggener, 9 Peters (U. S., 1835) 399. That also was a case on usury, and counsel for both sides dealt with Roberts v. Trenayne as an authority and incidentally repeated the expression *res ipsa loquitur*. And Story, J., taking up the argument on this point, said, "When, indeed, the contract upon its very face imports usury, as by an express reservation of more than legal interest, there is no room for presumption; for the intent is apparent, *res ipsa loquitur.*" Citing this case the expression was made use of thereafter, in the same connection, in Turner v. Turner, 80 Va. 381, and Sherwood vs. Rountree, 32 Fed. Rep. 120.

No collection of maxims, and no purely legal dictionary contains *res ipsa loquitur* until Anderson's Law Dictionary, published in 1889; and there it is defined:

> "The thing speaks for itself; the meaning is apparent."
> "The reservation on the face of an instrument of a higher than the legal rate of interest indicates per se usury." Citing 9 Peters 399, 80 Va. 381, and 32 Fed. Rep. 120.

In the case of Byrne v. Boadle, 2 H. & C. 721, 725 (1863), the case of the falling barrel of flour which struck a passerby, Pollock, C. B., interrupted the argument of defendant's counsel to say, "There are certain cases of which it may be said *res ipsa loquitur,* and this seems to be one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions." And this seems to have been the first time the Latin expression was used in a case of negligence. It was not used in the regular opinions of the Court in that case. Bramwell, B., who sat in the case,

viewed the process of reasoning merely as "judging the facts in a reasonable way." In the case of Scott v. London Docks Co., 3 H. & C. 596 (1865), the case of the falling bags of sugar, the same principle was applied, but *res ipsa loquitur* was not made use of. In Briggs v. Oliver, 4 H. & C. 403, on the fall of a packing case, decided in 1866, Bramwell, B., said, on the question whether or not there was evidence of negligence, "I think there was, and that this is one of those cases in which, as has been said, '*res ipsa loquitur*.'" And in Kearney v. Railway Co., L. R. 5 Q. B. 411 (1870), the case of injury by a brick fallen from a bridge, Cockburn, C. J., said, "My own opinion is, that this is a case to which the principle *res ipsa loquitur* is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply." These are the four cases usually cited as the foundation of the principle in the law of negligence. It is evident that the judges quoted had no idea of formulating a new principle. Pollock was, as he said, arguing the same inference of negligence which he himself had drawn in cases of railway collisions. Skinner v. Railway Co., 5 Exch. 787 (1850), and Carpue v. Railway Co., 5 Q. B. 747 (1844). The principle followed in the collision cases was exactly the same as that on which Byrne v. Boadle was decided.

In the law of negligence, then, the principle is older than the use of the Latin expression. It is no more than that applied many years back in the cases of overturned stagecoaches. Christie v. Griggs, 2 Campb. 79 (1809); Stokes v. Saltonstall, 13 Peters 181, 192-3 (1839); Stockton v. Frey, 4 Gill 406 (Md., 1846). And it is still stated and expounded quite independently of the Latin. Underhill on Torts (7 Eng. ed., 1900), 209 and 210. Indeed, as has already been said, it must be a principle of reasoning almost coeval with logical discussion. And *res ipsa loquitur* is not an expression of law, but a familiar, probably colloquial, Latin expression which has been made use of in opinions of judges as a terse statement of the probative effect of facts already proved or exhibited; clear enough to men of the classical training of the times of Croke, Story and Pollock, although it has proved a little confusing to men of this day. It would have the same applicability in all reasoning processes in any branch of intellectual activity. In Nichols v. Peck, 70 Conn. 441 (1898), the Court, on a question of revocation of a license to use a substitute way, said, "When the plaintiff chained up the gate, however, and locked it, he sufficiently manifested his intention that

this use should be continued no longer, and effectually revoked any license implied from previous conduct. *Res ipsa loquitur.*" And in Patterson v. Landsberg & Son, 7 Fraser (Scotch Court of Sess., 1905) 675, on a question of misrepresentations in the sale of sham antiques, it was argued by counsel: "The maxim *res ipsa loquitur* applied. If a man sold a sham coin at the price of a real one, he surely represented that the coin was genuine." And in the opinion, page 681, Lord Kyllachy said, "I must say I incline to hold upon the proof, and indeed upon the defender's own evidence, (1) that the appearance of age and other appearances presented by these articles constituted by themselves misrepresentations; in short, that the case is really one of *res ipsa loquitur;* (2) that this being so, the defender was not entitled to leave, as he says he did, the articles to speak for themselves, but was bound to displace the inferences which the appearance of the articles was to his knowledge bound to suggest."

An often-quoted definition of the expression when used in the law of negligence is that of Mr. Justice Holmes in Graham v. Badger, 164 Mass. 42, 47, that it is, "merely a short way of saying that, so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence and that, therefore, there is a presumption of fact, in the absence of explanation, or other evidence which the jury believe, that it happened in consequence of negligence." That is an accurate definition, and it brings out clearly the fact that it is the jury which makes the presumption, the jury which says *res ipsa loquitur.* And in Smith v. Baker & Sons [1891], A. C. 325, Lord Bramwell gave a clarifying illustration of the true principle in replying to an argument for a presumption of negligence from the fact that a stone lifted in a sling came apart and fell. "I have no objection to '*res ipsa loquitur,*' " he said. "I believe I was one of the first, if not the first, to use it in some cases about fifteen years ago; but it does not apply here. At least, I cannot use it. I know that bales and barrels do not move and fall of their own accord. I do not know that stones slung carefully will not come apart and fall. My notion is that they will. I think I have often lifted up a piece of coal and found that the part I had hold of remained in the tongs and the rest broke away. I should think there might be some cleavage, I think it is called, which would prevent the parts hold-

ing together. This may be ignorance on my part. But if it is, it should have been removed by evidence, and there is none."

It is observable that the process is not a mere presumption in all of the instances cited in this paper. The *res* speaks with different degrees of assurance. When the fact sought is an unseen one, such as the unseen cause of the fall of the barrel of flour, or Milo's actions just before the assassination, it can rarely be more than the subject of a rebuttable presumption, and the *res* must speak only by way of presumption. But when a writing is referred to in an inquiry as to its contents, or when Milo stands bare in the Senate, the result is a final demonstration, not a mere presumption; the *res* then speaks with finality.

The case of the sham antiques furnishes an instance of speaking otherwise than in the ascertainment of facts. There the *res* misstated facts and made misrepresentations for the defendant. So the *res ipsa* speaks variously. It speaks on the particular question in dispute, and the nature of its pronouncement must vary with the question.

For the Romans and the classicists of the later age *res ipsa loquitur* was, no doubt, an aid to reasoning. It is questionable whether it has any usefulness now, and whether there would not be a gain for correct thinking in disuse of the Latin and statement of the reasoning in each case in English.

CARROLL T. BOND.

November, 1923.

CIVIL JURIES AND THE LAW'S DELAY.

By HENRY T. LUMMUS.*

(From the Boston University Law Review for June, 1932.)

Trial by jury, in civil cases that are adapted to it, is pretty satisfactory. If the trial judge can put the jury into a judicial frame of mind, and then can instruct them simply and clearly as to the law, the jury will usually find the facts about as well as any other tribunal. Yet it would be hard to class a jury as superior, day after day, to an experienced and discreet judge as a fact-finding tribunal. The action of such a judge is commonly the touchstone by which we test the worth of a jury. The chief value of the jury system lies in the domain of statecraft rather than in that of judicature. It consists in the assurance which the jury system gives of popular participation in the judicial branch of government, particularly in criminal cases, rather than in any superior merit in arriving at truth and justice in particular cases.

When the Constitution of Massachusetts was adopted in 1780, it was only natural that the right of jury trial, even in civil cases, should be given in broad terms. Trials without jury were almost unknown; the history of persecution by royal judges not then independent of the Crown was fairly recent; life was less rapid than at present, time was more abundant and trials by jury formed a needed and unfailing source of public entertainment. The cases themselves were less complicated, and more within the daily experience of the average man, than they are now. Furthermore, the common law system of pleading to a single issue brought every case down to reasonable compass before submission to a jury.

As time has gone on, the absolute right of jury trial in civil cases has proved no unmixed blessing. Modern pleading permits law cases to become extremely long and complicated. Lawsuits have multiplied many-fold. In the year ending June 30, 1931, 36,190 ordinary actions at law were entered in the superior court, to be added to 72,433 pending at the beginning of the year. Of

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these, the court was able to dispose of only 34,477 cases in all ways. Of these 34,477 cases, jury trial was claimed in 28,405 or more than 82 per cent. Only 2,533 of the jury cases disposed of could be actually tried. The trials occupied 3,223 days, an average of 1.27 days to a case, though the fact that many of the cases were doubtless tried together probably makes the average length of trials somewhat greater. Jury trials are always slow trials; a judge can dispose of the same business at least twice as rapidly as a jury, with equal justice. There is not the same insistence upon points of evidence, nor the same dwelling upon logically unimportant matters that may arouse sympathy or prejudice, in trials before a judge. We hear little or nothing about congestion in courts sitting without jury. But jury trial lists have been chronically congested in every county, and today a case must wait two, three or four years before it can be reached. The situation tends to become constantly worse, for this congestion is turned to advantage by many defendants, and the greater the congestion becomes, the greater the advantage. "In 1902 there were eighteen justices, in 1929, thirty-two. While the number of jury entries alone has increased in this period 239%, and the number of law cases awaiting trial 162%, the number of judges has grown only 77%." Dunbar F. Carpenter, Esq., in 14 MASSACHUSETTS LAW QUARTERLY (August, 1929), 37. The situation is well stated by Mr. Justice Cox in 11 *Boston University Law Review* (April, 1931), 155, to which the reader is referred.

It is a commonplace that trial by jury is often claimed for reasons other than a genuine belief that trial by jury will be more advantageous than trial without jury, to say nothing of a genuine belief that it will result in better justice. The character of the cases removed from district courts upon sworn affidavit of counsel that "in his opinion there is an issue of fact requiring trial in the cause, and that such trial is in good faith intended," shows the motive for many of the claims of jury trial. Trifling collection cases, without a single jury feature, are removed in large numbers, ostensibly for jury trial, upon such an affidavit. While there are no statistics, it is fair to say that many of them turn out to be undefended. Even actions upon domestic judgments have been so removed. Chief Justice Bolster has called attention several times to the marked drop in removals just before the summer vacation, when delay can be obtained until fall without removal. Obviously delay is the main reason for removals in contract cases. Judge

Proskauer of New York (13 MASSACHUSETTS LAW QUARTERLY, May, 1928) declares that jury trial in the typical contract case is "wasteful of time and inefficient in result." He does not object to "jury trial in a criminal cause, nor even to jury trial in the type of civil cause like the negligence case, where a public demand for the judgment of the average man may still have logical basis." The truth is that litigants seldom have a genuine desire for jury trial in contract cases.

In cases originally entered in the superior court, the same improper motives for claiming jury trial exist. Does anyone suppose that insurance companies claiming jury trial in negligence cases have ordinarily any purpose except to tire the plaintiff out and compel him to settle upon terms forced upon him by his poverty? Of course plaintiffs are not without fault. In unmeritorious and speculative cases plaintiffs hope to find a weak and gullible jury, full of misplaced sympathy, and that hope creates much petty and worthless litigation to congest the jury lists. Nearly half the cases tried result in verdicts for the defendants, and nearly half the verdicts for the plaintiffs carry less than five hundred dollars damages, according to the tables prepared by T. Francis O'Brien, Esq., for the Judicial Council and printed in its Fourth Report (November, 1928) 86 and in its Fifth Report (November, 1929) 80. It has been suggested that the public could better afford to pay all the verdicts than to furnish the means of obtaining them. Whatever may be the reasons, the fact is unquestioned that our jury lists are congested with cases, many of them wholly without merit, many of them petty, many of them without substantial defense, many of them wholly lacking in features that would lead any sensible man to desire a jury, some of them too complicated for trial by jury, and all of them on the jury list merely because one party, it may be for unworthy tactical advantage, habit or whim, chooses to insist on jury trial.

This abuse of jury trial is no indifferent matter. It results in practical injustice both to other litigants and to the public. It is unjust to other litigants with legitimate jury issues, because they have to wait until the court has ploughed through the mass of rubbish that lies ahead on the lists. Schemes to advance certain cases, such as that introduced by the remarkable statute of 1929, c. 173 (G. L., c. 231, § 60 A), do little good, for they tend merely to turn the lists end for end without decreasing the congestion. For years there have been complaints that important equity cases

have to be referred to masters; if some of the jury sessions could be eliminated by reducing jury business, judges might be made available to hear long equity cases. But the great burden of injustice resulting from the abuse of jury trial falls upon the taxpaying public that provides "luxurious litigation" for all who choose to claim it. Jury trials are always expensive trials for the public. Thirty jurors at six dollars a day cost one hundred and eighty dollars a day, in addition to the summoning of jurors, their travel, their incidental meals while considering a case, and the services of two or three additional court officers to care for the jury. The extra cost of a jury sitting, over and above the cost of a sitting without jury in the superior court, much exceeds two hundred dollars a day. The total fees of civil jurors in Massachusetts for 1931, without considering other incidental expenses of jury trials, exceeded $645,000. The public provides district courts, in which justice can be had at comparatively small public expense; the superior court without jury, in which justice costs the public somewhat more; and the superior court with a jury, which is the most expensive of all. The litigant pays the public practically nothing, whichever court he chooses. To use Mr. Carpenter's metaphor (Dunbar F. Carpenter, Esq., in 14 MASSACHUSETTS LAW QUARTERLY, February, 1929, 18), it costs no more to ride in the Pullman than in the ordinary coach. While no tribunal is perfect, the judges of the district courts and of the superior court probably give as good justice as the average jury. If there are weak spots in the judiciary, surely there are weak and inefficient juries. The certainty of result in a lawsuit is not increased by a jury trial. Whatever its merits, jury trial is an expensive luxury.

For this abuse of jury trial, members of the bar are largely to blame. Clients wishing trial and decision in their cases rarely insist upon jury trial of their own motion; they seldom care about the form of trial, if they deem the tribunal fair. In equity cases, divorce cases, and others in which no right to jury trial exists, there is no demand for it. The "Memorandum on the Expense of Litigation," issued by the London Chamber of Commerce in 1930, says, "The vast majority of those who conduct business do not much mind by what procedure their disputes are settled provided the tribunal is one in which they have confidence." The Commission to Investigate the Causes of Delay in the Administration of Justice in Civil Actions, consisting of the late Robert M. Morse, Esq., Mr. Justice Wait, and Charles B. Barnes, Jr., Esq., in

their report in 1910, speaking of courts then subject to complete appeal (though the statement has considerable application to other courts), said that "the right of trial by jury is little valued or desired by a party until a decision adverse to him has been made." The decision to claim jury trial is usually that of the lawyer. Sometimes it is because of some tactical advantage, real or imaginary; sometimes it is for delay; sometimes it is to avoid blame if the trial should result unfavorably; often it is because of unreasoning habit. Whatever may be the motives behind the multitude of claims for jury trial, it is clear that nothing can be done to reduce the number without some compulsion. The individual lawyer or layman who sees some personal advantage in his case by a claim of jury trial, cares little about the delay of other litigants or the mounting cost to the taxpayers. Exhortation is vain; those who abuse the public so shamefully can be converted only through the pocket.

Judge Proskauer thinks that "in this country of today our people have come to regard jury trial in all types of cases with a baseless reverence and awe." For his part, the writer doubts whether the absolute right of jury trial, at the whim of a party, without the slightest expense to him but at great expense to the public, would appeal favorably to the mass of the people if they could be shown the facts. Of course trial by jury can be made the subject of much fervid oratory. But when the average taxpayer discovers how the right is abused, and that he is the victim who is left to pay the bills, oratory can hardly convince him that his liberty requires the maintenance of the system exactly as it is at present. American business efficiency, and such a wasteful method of settling controversies, make a strange contrast. In these times, when the cost of government is much in the thoughts of legislators and citizens, a plain opportunity at one stroke to increase efficiency and reduce cost ought not to be ignored.

Every measure of procedural reform in Massachusetts for many years has been confronted by this extravagant right of jury trial in civil cases at the whim of any party. The result has been a lot of feeble half-measures. Our provisions for summary judgment in worthless cases, or cases without real defense, remain comparatively toothless, because of the right without cost or reason to insist on jury trial. Our provisions for the final disposition of civil cases in district courts were saved from constitutional objection by permitting removal for jury trial upon easy terms of the

most petty collection cases, even of cases under the small claims law. The absolute right of jury trial without expense to the litigant still bars the way to effective procedural reform, and will do so as long as it continues to exist.

Only three ways appear by which the congestion in the superior court can effectively be relieved; (1) by doubling the civil jury establishment, adding new judges, clerks, court officers, juries and court rooms, (2) by transferring to some administrative board some important branch of business, or (3) by limiting the right to jury trial.

An increase in the judicial establishment, sufficient to cope with the situation, is out of the question. In the first place there are grave objections to such an increase in the size of the court. In the next place, calling so many men as jurors would be a considerable disturbance to industry in normal times. But financial considerations form the conclusive bar to this plan of relief. The increase, to be effective, must be a large one. A small increase, which is the only remedy that occurs to many people, would be swallowed up in the flood of business, civil and criminal, with and without jury. Doubling the civil jury sessions would require an annual expenditure of $645,000 more for compensation of additional jurors, the appointment of about seventeen more judges with salaries aggregating $204,000, the employment of many more clerks, court officers and stenographers, great incidental expense of all sorts, the initial expenditure of millions of dollars to build additional court rooms, and the annual expenditure of large sums for the upkeep of those court rooms;—and all this to perpetuate a system subject to great abuses and actually abused in countless cases.

The second possible remedy for congestion in the superior court is by transferring out of the judicial field into some administrative department a large block of business, such as automobile negligence cases. This was the method adopted a few years ago as to industrial accidents. Time and space do not admit a statement of the objections to such a plan; the broad objections were well stated by the present Lord Chief Justice of England in his book, "The New Despotism." More specific objections in Massachusetts were discussed by Dunbar F. Carpenter, Esq., in 14 MASSACHUSETTS LAW QUARTERLY (August, 1929) 53. It is enough to say, that the result would have elements of humor, if the insistence of the bar or the public upon a particular mode of judicial trial should result in the abolition of all judicial trial, at least in one field of law, and the

removal of that field from the judicial department altogether. That would indeed be straining out a gnat and swallowing a camel. Yet that result, if things go on as they are, is not unlikely.

The only remaining remedy, it seems, is by limiting the right to jury trial. The most obvious way to do that is by amending the Constitution. In England, where jury trial originated, there has been since 1854 no absolute right to jury trial, but the subject is regulated by rules of practice and is largely discretionary. *Rules of the Supreme Court, Order 36. Mayhead* v. *Hydraulic Hoist Co., Ltd.*, 1931, 2 K. B. 424. *Rugg-Gunn* v. *Rugg-Gunn*, 1931, Prob. 147. While jury trial is regularly granted in cases adapted to it, the parties cannot play with it, as they do here. In his report to the Judicial Council (*First Report of the Judicial Council*, November, 1925, 77), Robert G. Dodge, Esq., said, "A vastly greater percentage of the cases is tried in England without a jury than with us. Thus of the cases tried in London in 1923, only 267 were tried with a jury." Changing the Constitution, however, is not only difficult but unsafe. The constitutional provision for jury trial carries with it by implication the common law safeguards of judicial control of the proceedings and the right to set the verdict aside for cause. *Opinion of the Justices*, 207 Mass. 606. *Edwards* v. *Willey*, 218 Mass. 363. In some jurisdictions there is implied also the right to advise the jury as to the facts. *Capitol Traction Co.* v. *Hof*, 174 U. S. 1. *Patton* v. *United States*, 281 U. S. 276. Contra, *People* v. *Kelly*, 347 Ill. 221. *Com.* v. *Barry*, 9 Allen 276. *Com.* v. *Foran*, 110 Mass. 179. *Com.* v. *Leonard*, 140 Mass. 473. G. L., c. 231, § 81. If we were to abolish the existing constitutional right to jury trial, some legislature might some day substitute a statutory form of jury trial lacking the present safeguards.

Consistently with the Constitution, however, the legislature may impose reasonable conditions upon the right of jury trial, to the end that it may be reserved for proper occasions and not insisted on abusively or in bad faith. We now have in Massachusetts a mild exercise of that power, in the requirement of jury claims. G. L., c. 231, § 60, *Superior Court Rules* 44, 88 (1932). *Foster* v. *Morse*, 132 Mass. 354. *Higgins* v. *Boston Elevated Railroad Co.*, 214 Mass. 335. *Alpert* v. *Mercury Publishing Co.*, 272 Mass. 39. *Farnham* v. *Lenox Motor Car Co.*, 229 Mass. 478, 481. *Wheeler* v. *Tarullo*, 237 Mass. 306. A little less mild exercise of that power exists in the requirement of deposit and bond for removal to the

superior court for jury trial. *H. K. Webster Co.* v. *Mann,* 269 Mass. 381. It appears from the Report of the Commission to Investigate the Causes of Delay in the Administration of Justice in Civil Actions (1910), page 60, that in most of the states a party claiming jury trial is required to show his good faith by contributing a small part of the cost as a jury fee. If he insists on the slowest and most expensive mode of trial known, instead of another adequate mode that he can have for nothing, he must contribute reasonably towards the added expense. A jury fee was required in Massachusetts from 1805 to 1836, *Second Report of the Judicial Council* (November, 1928), 24. While the constitutionality of a very modest and fair jury fee was denied by the almost incredible decision in *LaBouve* v. *Balthazor,* 180 Wis. 419 s. c. 32 A. L. R. 862, the overwhelming mass of authority in favor of the constitutionality of such a fee is collected in the note to that case. As the court said in *Morrison Hotel Co.* v. *Kirsner,* 245 Ill. 431, 433, the right to jury trial "is not a right to command the services of a jury without cost but is of the same nature as the right to have official services performed by public officers." If no fee could be attached to the demand for a jury, then surely no fee of any kind could be required in litigation, for Article 11 of the Declaration of Rights establishes the right, even more fundamental than the right to jury trial, "to obtain right and justice freely, and without being obliged to purchase it." Neither the right to litigate in general, nor the right to litigate with the aid of a jury, is guaranteed by the Constitution to be without cost to the litigant. *Perce* v. *Hallett,* 13 R. I. 363. *Conley* v. *Woonsocket Inst. for Savings,* 11 R. I. 147. *Christianson* v. *Pioneer Furniture Co.,* 101 Wis. 343. *In re Lee,* 64 Okl. 310 s. c. L. R. A. 1918 B, 144. *Harbison* v. *George,* 228 Ky. 168.

How effective a reasonable jury fee would be in reducing the number of jury claims, and in enabling the court to give better and speedier justice to all litigants, instead of delayed justice to a few in violation of the same Article 11 of the Declaration of Rights, may be judged by the experience of New York, reported by Judge Proskauer in the Fourth Report of the Judicial Council (November, 1928), 24 and in 13 MASSACHUSETTS LAW QUARTERLY (May, 1928), 15. He says "To what a shocking level of inconsequentiality our litigation had fallen is evident from the experience following the legislation of last year [Acts 1927 c. 592; Civil Practice Act § 1557a] increasing the cost of jury trial by $25. The

enactment of this statute was followed by a reduction of 75% in the number of issues filed for jury trial." The plan of the Judicial Council to encourage litigation in district courts by a small entry fee in those courts and a larger one in the superior court (*Seventh Report,* November, 1931, 13) is sound; but it should be supplemented by a jury fee in the superior court to be paid by litigants who are unwilling to accept the less expensive trial without jury. It may be well still to permit removals from the district courts upon deposit of no more than the larger entry fee in the superior court; sometimes local conditions justify removal to a state-wide court, without regard to the need of jury trial. But removed cases as well as others ought, when a jury is claimed, to be subjected to a jury fee, payable to the county, which now carries the extra burden of expense of jury trials. There seems to be no reason why the party should get it back, even though he win the case, for he has a less expensive mode of trial available without cost. The time for electing jury trial, and paying the jury fee, ought to be moved back to an earlier stage of the case than that specified in G. L., c. 231, § 60.

As to the details of the plan, a recent share in rule-making leads the writer to speak with some diffidence. The regulation of practice requires study, conference, experience if that is possible, judgment of human motives, and a considerable gift of prophecy. Our committee on rules of the court was greatly aided by suggestions from the bar and from court officials, and many measures that seemed fair at first sight failed to survive the test of general criticism. The great objection to a jury fee is that the most reasonable fee may be a barrier to a poor litigant with a genuine jury case, while the same fee may not be enough to prevent a wealthy litigant from claiming a jury for improper motives. A fixed and arbitrary fee would give a choice to wealth while poverty would have no choice. To meet that objection, so far as it is possible to meet it, it might be well to make the jury fee large enough to deter even well-to-do litigants from claiming juries wholesale for tactical reasons. Then the court should be given discretion to reduce or remit the fee in cases adapted to jury trial when the court is satisfied that trial by jury is desired reasonably and that the payment of the fee would be a hardship. While the discretion should be given broadly, possibly the court by rule under G. L., c. 213, § 3, Second, might classify cases and regulate the exercise of its discretion. With a provision for discretion, it seems

that a jury fee of twenty-five dollars, about one-third of the compensation of twelve jurors for one day—only a small fraction of the actual added expense of trial by jury—would be reasonable and yet effective.

Another mode of dealing with the matter might have its advantages. The modern tendency is to restore to the courts the control of practice. In Rhode Island, for example, the courts have been given authority to make procedural rules which shall supersede earlier conflicting statutes. *Superior Court Rules,* 1932, Annotated, 7, 8. Two notable examples of this tendency in Massachusetts are the small claims law (G. L., c. 218, §§ 21–25) and the declaratory judgment law (G. L., c. 213, § 3, Tenth A), in each of which the creation of a new and revolutionary practice was left to the courts themselves. The advantages of this course are obvious. Courts have more time for study than hurried legislative committees; their study can be extended and continuous; they are closer to the facts; and after experiment their mistakes can be sooner and more easily corrected. A statute empowering the superior court to impose reasonable conditions upon the claim of jury trial would enable that court to discover the least restriction that would remove the congestion of jury lists and do justice to litigants generally and the tax-paying public.

It may be unnecessary to add that the writer is expressing his own views, not those of the superior court. A long experience, however, in procedural reform, first in the district courts and later in the superior court, has led him to the belief that the prevention of the present abuse of jury trial is the key to the problem of judicial administration in civil cases. Reform of some sort must come. Will the bar take the lead? Or, as often in the past, will lawyers wait for reform to be forced upon them by laymen?

SUPPLEMENTARY LETTER FROM JUDGE LUMMUS.

WORCESTER, July 11, 1932.

FRANK W. GRINNELL, ESQ.,
Editor, MASSACHUSETTS LAW QUARTERLY,
Boston, Massachusetts.

MY DEAR MR. GRINNELL:

My little article, "Civil Juries and the Law's Delay," published in the *Boston University Law Review* for June, 1932, advocated an elastic jury fee, primarily to increase the efficiency of the court and secondarily to reduce the cost of the judicial system. It was not aimed at emergency relief during the current depres-

sion. Nevertheless it has attracted the attention of Senator Wragg, as indicating a possible means of meeting the present financial exigency. If it is to be considered for that purpose, something ought to be said by way of supplement, and I am addressing this supplement to you, since you have expressed a desire to reprint the article. You are at liberty to print this letter also.

For the past year the Superior Court, in an effort to dispose of accumulated jury cases, has been referring many automobile negligence cases to auditors. The court has no power to provide that the finding of facts shall be final, unless the parties so agree, and many parties insist upon reserving the right to try the case over before a jury. Nevertheless this practice has resulted in many settlements and has helped reduce the congestion of jury cases. But it must be regarded as a useful makeshift, not as a permanent remedy. Its success depends upon the continued co-operation of parties, and that is uncertain. As a means of present financial relief in this emergency, it is worthless. While hearings before auditors cost the public much less than jury trials, and in a few years doubtless would help the public treasury, the immediate effect is quite the reverse. The jury sessions have to continue in full force, with all their expense, and the increased cost of auditors forms an additional burden upon the budget of the current year. While this is the only remedy for congestion open to the court without legislation, it is not an adequate remedy.

A jury of less than twelve is not the jury provided by the constitution. *Patton* v. *United States,* 281 U. S. 276, 288, 289. *Opinion of the Justices,* 41 N. H. 550. It has been proposed that parties be coaxed or coerced into trying cases before a jury of six instead of a jury of twelve. The only effective means proposed for doing this is to require a substantial jury fee for a jury of twelve and none at all for a jury of six. This was the recommendation of the Judicial Council of Rhode Island in their Fifth Report, made in December, 1931, which contains a table showing the jury fees required in various states.* Some states require a jury fee much larger than the twenty-five dollars suggested in my article.

While the small jury would reduce the cost of jury trials, it would be useless in preventing congestion of jury cases or in promoting the efficiency of the court. If every litigant who now would claim a jury of twelve should accept a jury of six, the jury lists would still remain congested, jury trials would still take undue time, and the efforts of the court to plough through the accumulated business would still remain hopeless, just as at present. If some litigants should insist on a jury of twelve, we should have the inconvenience of two kinds of jury trials, requiring different sessions in every county, some with thirty jurors and some with sixteen jurors.

The elastic jury fee recommended in my article would serve both purposes. It would give effective permanent relief to the

*The table referred to is reprinted hereinafter on page 71.

treasury by reducing jury claims and jury sessions, and at the same time it would reduce the congestion of business and make for efficiency. If the plan should be applied to pending cases as well as new cases, by requiring parties speedily to pay the fee or see their cases transferred to the list without jury, the relief, both financially and in point of efficiency, would be immediate. While some have doubted whether a jury fee of twenty-five dollars would outweigh the advantage of delay in the opinion of insurance companies defending negligence cases, my own opinion is that wholesale jury claims for tactical purposes would cease; if they should continue, a provision for interest upon the damages, from the date of the writ, would speedily stop them.

It might be possible to combine the elastic jury fee recommended in the article with a plan for a small jury, in the hope of obtaining still greater financial relief. In other words, a substantial jury fee might be required for a jury of six, and a larger one for a jury of twelve. Whether this would actually result in greater financial saving than the plan proposed in my article, may well be doubted. Surely it would not unless the fee for the jury of six should be pretty substantial. The inconvenience of two kinds of jury trial is manifest.

My own thought is, that the elastic jury fee proposed in my article, applied to pending cases as well as to new cases, without any attempt to introduce the small jury, would furnish adequate financial relief, in a clean and workable fashion, and at the same time would relieve the congestion of jury cases. At any rate, the problem must be grasped firmly; a timid, feeble compromise will lead us nowhere.

Very truly yours,

HENRY T. LUMMUS.

EXTRACTS FROM THE "BAR BULLETIN OF THE BAR ASSOCIATION OF THE CITY OF BOSTON," FOR AUGUST, 1932.

In this issue, the editor, after referring to the article of Mr. Justice Lummus, says:

"Perhaps an equally vital question is whether the citizens of this Commonwealth either will or can continue to stand the expense of a method of trial, which is costing about $400 a day for each jury session. Economic pressure is always a potent factor in forcing changes. It may be, and, in our judgment probably is, the fact that the patent inability of the public to meet the costs of government is destined at no distant date to upset some of the most cherished traditions of the bar.

"During the year ending June 30, 1931, 2,533 jury cases were tried. The total fees of civil jurors during that period, exceeded $645,000. By a simple division of these figures presented by Judge Lummus, it appears that each jury case tried costs on the average

$254+ *for jurors' fees alone.* Jury trials are always expensive trials for the public.

"The Superior Court sitting in Suffolk County averages approximately seven civil jury sessions a day for 200 days each year. For each session, there is a separate jury panel of 30 jurors. 'Thirty jurors at six dollars a day cost one hundred and eighty dollars a day, in addition to the summoning of jurors, their travel, their incidental meals while considering a case, and the services of two or three additional court officers to care for the jury.'

"If our calculations are correct, seven times thirty jurors cost $1,360 a day for their fees alone. If instead of having a separate panel for each session, jurors should report to one central room from which they are drawn for each session as need arises, obviously seven full panels of thirty each would not be required. If as few as 40 prospective jurors could be dispensed with, the saving in jurors' fees alone would be $240 a day, or $48,000 for the 200 court days. This central system has been in operation in the common pleas court in Cleveland for several years, with most excellent results, as the Chief Justice of that Court told us at a luncheon of our Association in December, 1930.

The following excerpt is from the report of that address printed in the BULLETIN for January, 1931:

> "It is the duty of the Court to administer justice with the least possible expense to the taxpayers, so I am continuously keeping watch that I have not too many jurors. It is not fair to a business man to keep him locked up kicking his heels, so I am watching to see that I have no idle jurors, and you would be surprised at what I save each year. In 1926 we disposed of twice the number of cases we did in 1922, and I saved $40,000 in jury fees alone." . . .

"It seems possible that the lawyer might increase his earnings substantially by resorting more frequently to trial to the court, because 'a judge can dispose of the same business at least twice as rapidly as a jury.' There would therefore be the opportunity of planting two trials where but one grew before. Apparently, however, that section of the bar which is concerned with trials is not especially concerned with the emoluments derived therefrom.

"Although Judge Lummus does not mention the very potent part the bench necessarily plays in the legal picture, we do not imagine that he thinks it ought to be ignored. In fact, he perhaps more than hints that much could be done through the courts. . . .

"If it were permissible, we should make the concluding sentence of 'Civil Juries and the Law's Delay' read:

> 'Will bench and bar take the lead? Or, as often in the past, will those who have charged themselves with administering justice wait for reform to be forced upon them by laymen?' "

ENGLISH JUDICIAL PROGRESS IN THE EARLY PART OF THE NINETEENTH CENTURY.

In the first of Mr. Atlay's readable and discriminating volumes on, "The Victorian Chancellors," it appears that a commission was appointed in 1821 to inquire into the practice of the Court of Chancery. This commission reported in 1826 and the report was turned over to Sir John Copley, then attorney-general (later Lord Lyndhurst) with instructions to prepare a bill for reform. This was one of the first government proposals for judicial progress in the movement which reached its climax fifty years later in the Judicature Acts. In speaking of this bill, which did not pass beyond the preliminary stage, Mr. Atlay says (p. 44),

> "As was only meet and fitting, Sir John Copley had paid an eloquent tribute to the 'artlessness and simplicity of Lord Eldon's manners, his anxiety to do justice, the depth and extent of his judgment, and his vast and capacious memory.' But he could not disguise the fact that, though it was deemed preferable to proceed by way of statute, the major part of the suggested reforms could be now, and might at any time during the last five and twenty years have been, carried out by Lord Eldon's own fiat as a simple order of Court".

CONSTITUTIONAL POSSIBILITIES OF PRACTICE IN JURY TRIALS.

The current discussions of jury trial as the principal cause of expense, delay, and congestion, suggest the consideration of constitutional possibilities in the regulation and conduct of such trials without in any way infringing the substantial right which the Constitution provides. The American Bar is peculiarly apprehensive about any suggestion for regulating jury trial to which they are not accustomed. Many lawyers and some judges seem to regard such suggestions as part of some concerted scheme to abolish the right to jury trial because occasionally some extremist suggests orally or in print that it ought to be abolished. We may ignore such extreme proposals because every level-headed lawyer knows that it will not and ought not to be abolished. Professional memories in general seem to be short and most of the apprehensive lawyers forget that most of the proposals, in regard to such trials, are not new experiments but are revivals of earlier practice, just as the act of 1929, allowing a defendant in a criminal case to waive a jury and choose a trial by the court, was a revival of a practice recognized in Massachusetts by Liberty 29 of the Body of Liberties of 1641.

Jury fees were required in Massachusetts from 1805 to 1836. The fifth report of the Rhode Island Judicial Council calls attention

to the fact that eleven states now provide for a trial by jury of less than twelve, and such a statute was held constitutional in Connecticut. Whether it would be held constitutional if it were made compulsory need not be considered, but there seems to be nothing in the Constitution to prevent parties from waiving the right to a full jury of twelve and agreeing to a jury of six or even three, or to a majority verdict, without depriving the proceeding of its judicial character. We are familiar with the practice of allowing the parties to waive their jury trial entirely by trying their cases in the district courts or before a single justice in the Superior Court. In the same way, if parties wish to try before a small jury it is difficult to see why anyone should object or why the Superior Court might not provide opportunity for such trials by rule without the necessity of legislation.

There has been much discussion of the Massachusetts statute of 1860 and statutes of other states purporting to restrict the freedom of the judge in talking to the jury. We believe that some of these statutes are unconstitutional,* and in this connection we call attention to the latest utterance of the Supreme Court of the United States on the subject in *Patton* v. *U. S.*, 281 U. S. 276 at pages 288, 290, where it is stated that the constitutional right "means a trial by jury as understood and applied at common law, and includes all the essential elements" which "were (1) that the jury should consist of twelve men neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law *and advise them in respect to the facts,* and (3) that the verdict should be unanimous. . . . These common law elements are embedded in the constitutional provisions . . . and are beyond the authority of the legislative department to destroy or abridge." This clear statement of the nature of the right to jury trial in the Federal courts is a statement also of the constitutional law of Massachusetts as it was before 1860 and as we believe it is today, and the legislature has never had any power to change it.

Our Massachusetts statute G. L., Chapter 231, Section 81, has provided since 1860 that

> "The courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law."**

*See MASSACHUSETTS LAW QUARTERLY for August, 1918, pp. 347-357 for a discussion of the proposed "Caraway" bill then, and since, before Congress.

**For General Butler's account of the origin of this statute see MASSACHUSETTS LAW QUARTERLY for January, 1926, p. 57, and for November, 1915, pp. 76-8.

It is a "cardinal" rule of construction that a statute must be construed if reasonably possible in such a way as not to violate the Constitution. The common law function of a judge in talking to a jury about the law may be properly described as "charging" in the sense of instructing, but the word "charge" in the sense of instructing does not accurately describe the judge's function in talking about the facts. As stated by the Supreme Court of the United States the judge may "advise" the jury in respect to the facts. In England it is called "summing up." In advising them it is part of the judge's duty to explain to them that what he says about the facts is merely advice as distinguished from the instructions that he gives them about the law. We submit that there is nothing in the Massachusetts statute to prevent a judge of the Superior Court from performing his constitutional function of talking freely to the jury about the facts if he thinks it will help them and if he does it fairly and explains to them that he is merely advising them and that it is their function to decide. If he should fail to explain this to them and should "charge" them about the facts as if he were instructing them his charge would be open to exception. The ability to perform this function fairly is one of the characteristics of the best trial judges. No legislation is necessary in our opinion to authorize our judges to do this.

In view of the recent utterance of the Supreme Court of the United States above quoted, it may be well for the bench and bar to reconsider their notions about the statute.

The possible vague notion which some may have that the common law allows a judge to talk in any way he sees fit without restraint to a jury about the facts is, of course, erroneous. An unfair instruction or summing up is a proper subject for an appellate court. In explaining to the Canadian bar the nature and importance of the English Court of Criminal Appeal, which was created in 1907, Lord Chief Justice Hewart said:

> "What matters, and matters profoundly, is that everybody engaged in administering the criminal law, upon whatever rung of the ladder he may be, throughout the whole hierarchy, is well aware that a Court of Criminal Appeal is in existence. The consequences of that diffused and abiding knowledge are quite incalculable. As Robert Burns said of something else:—
>
> 'What's done we partly may compute,
> But know not what's resisted'.

> If any one has any real doubt upon the matter, let him contrast and compare, for example, the summing-up in a criminal case tried today with the summing-up in a criminal case tried 50, 40, or even 25 years ago. Speaking for myself, at any rate, I have not the smallest doubt that, among the many duties which belong to the Lord Chief Justice of England, there is none more important than his duties connected with the Court of Criminal Appeal'' (*see third Report of Judicial Court of Massachusetts, Appendix D, page 131 at pp. 134-5; Reprinted in* MASSACHUSETTS LAW QUARTERLY *for November, 1927*).

In *Nudd* v. *Burroughs,* 91 U. S. 426 at p. 429, the Supreme Court of the United States said that the jury

> ''. . . must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their independent judgment''.

Jurors in Massachusetts before 1860 were supposed to be sufficiently intelligent and independent to listen to a judge and then make up their own minds about matters which were fairly presented to them.

We submit that the Massachusetts statute does not alter the common law relations of judge and jury, but when properly construed merely declares the law as it was before the statute was passed.

In *Commonwealth* v. *Barry,* 9 Allen 276, shortly after the act of 1860, Chief Justice Bigelow said:

> ''The prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence . . . but further than this the legislature did not intend to go''.

See also *Plumer* v. *Boston El. Ry.,* 198 Mass. at 214-15.

We submit that even that interpretation by Chief Justice Bigelow must be qualified to mean an expression of opinion by the court without making it clear to the jury that the opinion is expressed merely by way of advice which they are not bound to follow. The constitutional aspect of the statute was not discussed by Chief Justice Bigelow and, unless we are mistaken, has never been thoroughly discussed in any Massachusetts case. The statement of the judge to the jury in the Barry case appears to have been objectionable regardless of the statute.

F. W. G.

A CONFESSION "WITHOUT ANY THREATS OR PROMISE OF IMMUNITY".

Since the Wickersham Commission Report much attention has been directed to police methods in obtaining confessions to be used in the prosecution of crime*. While law abiding citizens are willing that all reasonable latitude shall be allowed the police in their efforts to protect society, the truth about lawless police methods comes slowly home to most of us as a disturbing shock. It is something more than a sporting instinct in favor of the under dog. It is based on a fundamental conviction that Government officials in order to be supported by public opinion must themselves discharge their duties under, and in accordance with, the law.

To the readers of detective literature, especially to those who indulge in the lurid colored covered series of "True", "Real", or "Startling" Detective serials, a strange and revealing insight into this phase of criminal law is opened. These papers pay for the police stories while the crime described is still the sensation of the day. The demand is for the officers of the law in their own words to spin their yarns of how they did their big jobs and how the villain confessed to them. No state prosecutor or district attorney guides the telling or expurgates the tale.

This morning (February 2, 1932) we read in the newspaper, as the attorneys for the defendant were fighting desperately on a question of venue, that it is already indicated that there is to be a legal battle to prevent the introduction in evidence of an alleged confession which the Government had obtained in a sensational West Virginia "Bluebeard" murder trial. It will be interesting to hear the official story presented at the trial on which the prosecution rests its right to have this confession introduced as evidence before the jury. As the law is everywhere recognized, to make a confession competent evidence against an accused it must be proved as a preliminary fact that the confession was voluntary. This means that it was not the result of threats, fear or any coercion, or obtained by any promise of favor or of immunity or hope of reward. By a curious coincidence as we lay aside the

* "Lawlessness in Law Enforcement" was the subject of the eleventh report of the National Commission on Law Observance and Law Enforcement, commonly known as "The Wickersham Commission". This report was numbered "Eleven" and dated, "June 25, 1931". It contained a general preliminary discussion by the commissioners, a separate individual statement by one of the commission, Monte M. Lemann, Esq., of New Orleans, and two reports made to the commission by Professor Zechariah Chafee, Jr., of the Harvard Law School, and Walter H. Pollack, Esq., and Carl S. Stern, Esq., of the New York Bar. One of these reports was entitled, "The Third Degree" and covered pages 17–261.

newspaper here at hand is the December number of "Startling Detective Adventures" where Lieutenant H. H. Herzog of the Park Ridge Illinois Police Department in his own words tells how he obtained this very confession "*without any threats or promise of immunity*" and of "*the free will and accord*" of the prisoner.

The murder was a particularly atrocious one. Harry Powers of Clarksburg, West Virginia, through a matrimonial correspondence agency using the name Pierson, made the acquaintance of a Mrs. Eicher living in a Chicago suburb, Park Ridge. She and her three children were induced to leave their home and journey to Clarksburg, where she expected to marry Powers, alias Pierson. There they were taken to a lonely building some little distance from town, described as "a crypt of death", kept prisoners and ultimately most foully murdered.

Finally such discoveries were made as to lead Chief Duckworth of the local police to arrest Powers on a charge of murder. Lieutenant Herzog was sent from Illinois to assist the police in Clarksburg who evidently did not understand the technique of getting a confession. The prisoner had evaded all their efforts. He claimed he had nothing to confess. He wanted a lawyer. From this point on let the Lieutenant tell his own story.

> "I took charge of the effort to obtain a confession from Powers, at midnight.
>
> " 'I can trap him into saying something', I told Chief Duckworth. 'Let me have him alone for a half hour or so.'
>
> "The chief and Sheriff Grimm agreed. I stepped into the sheriff's room where Powers was seated on the edge of a couch, and closed the door.
>
> "The pudgy form moved a little. The bland blue eyes gazed at me. The protecting spectacles no longer magnified them.
>
> " 'Hello,' he said.
>
> "I kept silent.
>
> "Cries from among the 3,000 persons milling outside the courthouse could be heard.
>
> " 'They want you,' I said.
>
> "He just looked at me. And in that instant I saw the bland 'Connie Pierson' vanish from those eyes and, in the same blue orbs, in the same swinish face, I saw a fiend peering out! I saw the beast, the monster that killed for pleasure, that gloated over human blood.
>
> * * * * * *
>
> " 'Powers, you're going to sign your name to a confession of the murders of the Eicher family,' I said.

"He looked at the floor. 'I'm going to talk to my lawyer.'

"'Greta, Anabel, Harry — those children were my friends —' I said. 'Powers, I see them in my mind now, Greta and Anabel in their little beach pajamas, just as they were when you carried them away. They are calling to me as I pass their house. And now — Powers — I'm looking into your eyes and I see there Greta and Anabel and Harry — I see them looking at you, crying, screaming, falling, covered with blood. Powers — you killed them!'

"The fiend blinked as if to prevent my looking into his eyes. He fidgeted and nervously clawed at his hair. 'Give me time,' he whined.

"'You didn't give those children any time to live!'

"A roar from the mob which milled about the jail filled the room. 'Lynch him!' came the ominous cry.

"Powers shuddered. I leaped at the opportunity. I stood over him hurling questions as fast as I could talk. I spoke of Mrs. Eicher and the children, calling them by name. I trapped him into confused lies about the Park Ridge house.

"Powers was perspiring now. He mumbled half-hearted replies to my questions. I beat him down with a barrage of denunciations.

"Again the ominous roar of the mob filled the little room as guards, armed with tear bombs and machine guns, fought back the mob which sought to wrest the arch fiend from our hands.

"I called Chief Duckworth, Sheriff Grimm and the state police. The grilling went on. Beads of clammy sweat stood out on the forehead of the fiend, but we gave him no rest. Hostile eyes ringed him on every side. The fury of our questions beat like hammers on his brain. Hopelessly trapped —back to the wall—he fought, striving to fend off the doom which was closing in upon him.

"The end came at dawn. Perspiring, disheveled and distrait he faced us. His eyes were glassy; his nerves frayed. Suddenly he broke, 'For God's sake, let me alone!' he screamed. 'Let me sleep. I did it! I'll sign!' His voice trailed off in a paroxysm of sobbing.

"An affidavit was quickly drawn and Powers signed it. The document read:

"'I did, in the month of July, 1931, murder Mrs. Asta Eicher and her three children, Greta, Harry and Anabel, by using a hammer and strangulation. I further state that my wife and sister-in-law knew nothing of my plans and are innocent of anything in connection with the murders. I make this affidavit of my own free will and accord, without any threats or promise of immunity.'"

Boston, February, 1932. LEE M. FRIEDMAN.

EXTRACTS FROM WENSLEY'S "FORTY YEARS OF SCOTLAND YARD" — THE JUDGMENT OF AN ENGLISH DETECTIVE CHIEF.

Introductory Note.

We have recently been reading a very interesting book, entitled, "Forty Years of Scotland Yard," being the record of a lifetime service by Frederick Porter Wensley, formerly chief constable in the Criminal Investigation Department, who reorganized the London police system to meet the difficult problems following the war. Few men have had as long and varied an experience with so many varieties of criminals, and in every position from the top to the bottom of a police force, as Mr. Wensley. For more than twenty years, he served in the Whitechapel District of London.

The judgment of a man with such experience and record of accomplishment is suggestive and illuminating, and is here reprinted by way of contrast to the American picture presented in Mr. Friedman's article and in the newspaper accounts of the recent investigation of the death of a prisoner in New York and the subsequent indictment of several members of the New York police or detective force.

F. W. G.

Mr. Wensley's Views of the "Third Degree". (pp. 82–84.)

"I am amused—although it is not always an amusing matter—when I hear the taunt 'Third Degree' levelled against Scotland Yard. I know of nothing more likely to defeat its own ends than any form of bullying. Of course, there are officers who are apt to become impatient and irritable when they are called upon to listen to an interminable string of obvious and contradictory lies—I have known judges show petulance in similar circumstances—but these men seldom get satisfactory results. Often they come to me baffled, and I have managed to get at the truth by directly opposite methods.

"When a person under suspicion of a grave crime is detained or arrested he is, in ninety-nine cases out of a hundred, thrown off his equilibrium. It does not matter whether he is innocent or guilty—he is not normal. However anxious or willing he may be to make a statement, his mind is too disturbed to permit him to give a clear explanation.

"This applies also to witnesses who may have had some intimate association with the crime or the criminal, who suddenly realize that they may have placed themselves in a position open to misconstruction or are shocked to find that someone near and dear to them is under suspicion.

"In dealing with these people patience is needed to get them back to balanced common sense. For myself, time meant nothing to me in these matters. Hour after hour I would spend if there was the faintest chance of gaining more light on a case. Nor did I—I say it with all sincerity—ever try deliberately to trap a man. Perhaps I was the more successful on that account. I made it a point to avoid all show of officialdom, and to act as decently as I could, and I never lost a chance to show any small courtesy.

"On these occasions many things that were not strictly evidence might be mentioned. I never discouraged these discursions. One never knew to what they might lead. At any rate, they sometimes served to bridge the gaps in what otherwise might have been a disconnected story.

"Until I felt that I had a full grasp of what a person wanted to say I never had anything written down. This would save much obscurity and irrelevant detail from clogging a statement. If, for any reason, I felt that a witness was drawing on his imagination, I would point out to him the stupidity of telling lies that would be put on record and, although it was entirely immaterial to me what he said, he might wish to think before he had committed himself.

"As I have hinted, this attitude of candour and fairness was really more effective than any subtle attempt to entrap a person, or anything in the nature of browbeating. It convinced people that they would be fairly treated, and they lost a kind of antagonism. Indeed, one would sometimes find an indirect admission of importance being made in the form of a request for advice—which I always gave as far as I might be lawfully justified. 'Tell me, Mr. Wensley,' said one man accused of murder, after stubbornly protesting his innocence, 'If a man hit a woman with a hammer, not intending to kill her, and she died, would that be murder?'

"In another case of murder I was interviewing a suspect in a police station, and he was telling a very involved story. It was towards midnight, and suddenly a terrific thunderstorm broke. As we talked between the crashes of thunder and the glare of the lightning, I saw perspiration dripping from his forehead, while his eyes would wander from me to the window. I turned to see what was attracting his attention. The next flash revealed to me a big cinema poster on which, in glaring letters, stood out the words: TRUTH WILL OUT . . .

"I have been often asked whether I made a point of carrying arms when likely to run across dangerous or violent criminals. In fact, I never worried about it, and even at the siege of Sidney

Street I was unarmed. On occasions, when I have known colleagues of mine to be carrying pistols, I have, I honestly believe, been more scared of them than of any criminal. From a police point of view I think it is a mistake to carry any lethal weapon. It needs a very nice judgment to hit upon the exact moment when one would be justified in using a gun. In this country an officer would only be entitled to shoot when his life was in imminent danger. To pull the trigger a moment too early, or because of some misunderstanding, would almost certainly bring about a charge of manslaughter.

"No man has been more threatened than I have. There were plenty of people who wished me ill and were capable of going to any extreme. If I had taken any serious notice of what they said I should never have slept. I took the precaution of keeping myself always in condition, and, perhaps as a result, I never cared a bit for the next man. I found that the best method of impressing the people who were loudest in announcing their intentions to kill me in various unpleasant ways was to show myself among them. They seldom lifted a finger. And although I have been knocked about times without number, I have never been the subject of a revengeful attack by any of the many of hundreds of men I have sent to prison."

CAPITAL PUNISHMENT.

Introductory Note.

The community and the legislature are subjected to an annual petition and argument in favor of abolishing capital punishment or for the appointment of a special recess commission to study the subject. In the Quarterly for January, 1931 (pp. 97–101), we printed some discussion of this subject and referred to the extended report and recommendations of a majority of the English Commission. We also expressed the view that the time and energy devoted by the advocates of abolition might better be spent on the more difficult and more frequent problem of the proper methods of punishment for other than capital offences. In this connection, the balanced judgment of Mr. Wensley based on his experience may be of as much value on the main question of policy as the views of a special commission.

F. W. G.

Mr. Wensley's Views on "Capital Punishment". (pp. 85–87.)

". . . a detective has opportunities to form an opinion of our penal system because he sees more sides of it than anyone else. A judge sees a criminal only in court; a prison official sees him only in prison. Neither of them sees him as he really is. The

individual in the dock and the individual at liberty are different persons. In the atmosphere of the court the prisoner is pretty well always under abnormal stress, and generally he is on his best behaviour, trying to create a favourable impression. Outside, he dresses, acts, and speaks in quite a different fashion. The detective knows many collateral facts about him that he is not permitted to give in evidence—his mentality, his domestic circumstances, his motives in taking to crime, his difficulties, his reaction to punishment. Frequently the detective is the only person with a clear and undistorted knowledge of the prisoner in the dock.

"I have never been a believer—some people may think this strange—in capital punishment for all kinds of murder. Many murderers have passed through my hands. Some of them have thoroughly deserved to hang, but others have been really victims of circumstance — men or women who have killed under some sudden or overmastering passion. The great majority of murders are crimes of impulse. The people who commit them do not stop to think of the consequences. If capital punishment were abolished tomorrow I do not believe crimes of this sort would either increase or decrease.

"It is quite a different matter when one considers the case of a professional criminal resorting to murder. I have known numbers of crooks who had no regard for any human life except their own. They have been deterred from murder only by the certainty that they would be hung if they were caught. It is easy to realize what would be the attitude of these people if there were no such thing as capital punishment. Murder would increase considerably—and the victims would be mainly police officers. If a professional criminal could use any homicidal means to prevent detection and arrest there would be murder after murder of that type. Take, for instance, a dangerous criminal who has suffered a long term of penal servitude. Whatever may be said about pampering in prison, there are few people who like it. Such a man is trapped—perhaps by a single detective. If he can kill that officer he will at least have a chance of escape. The worst that can happen to him is that his term of imprisonment will be increased. To him it is a gamble—extra imprisonment against no imprisonment at all. In nine cases out of ten he will therefore take the risk. With the fear of death as against imprisonment the odds become too heavy, although it must be said that there are some who, even with execution staring them in the face, will not hesitate to kill. They take a sporting chance of acquittal.

"The time will, perhaps, come when capital punishment will cease to exist, but if it does some method will have to be found of dealing with criminals other than giving them long terms of penal servitude. Once a criminal has tasted prison he dreads going back—but, all the same, he continues to commit crimes. With that fear before him and no risk of the supreme penalty, he will be tempted to shoot. No criminal murders or attempts to murder

a police officer simply because he is a police officer. It is to evade arrest for a criminal offense that he has committed or is in the act of committing, through dread of the probable consequences.

"As things are, my experience teaches me that we must hang some murderers. Unless capital punishment had existed I am not sure that during my time in the H Division we should have been able to clean up Whitechapel as we did and put an end to cases of murder and robbery that were much more common than is generally known."

A LEGAL ABSURDITY OF THE FIRST MAGNITUDE FOR WHICH THE SUPREME COURT OF THE UNITED STATES SEEMS RESPONSIBLE.

As this number was going through the press, our attention was called to the decision of the Circuit Court of Appeals in *George A. Ohl & Co., A. L. Smith Iron Works*, 57 Fed. 2nd Series 44. The bill of exceptions was signed by the judge with his initials only. It was held that the initials did not satisfy the act of congress which provides that "A bill of exceptions . . . shall be deemed sufficiently authenticated if signed by the judge"; and that it was too late to send the case back for amendment, the term having expired. The decision as to the sufficiency of initials was based on *Origet* v. *U. S.*, 125 U. S. 240, 244 and *Kinney* v. *U. S. Fidelity etc. Co.*, 222 U. S. 283; but to penalize the excepting party *for the mistake of the court* by interpreting the acts of congress to preclude amendment seems too unjust a meaning for a court in the administration of justice to attribute even to an act of congress.

Massachusetts lawyers have relied on judges' initials for years, both in state and federal courts, and they seem harmlessly informal. It is difficult to see how initials signed by a judge are anything but a signature. The United States Courts should be able to develop the practice of their judges in such formal details without denying justice to litigants by refusing to hear the merits of a case. We understand that a petition for *certiorari* has been filed and we trust that it will be granted.

The fact that such a decision could be made illustrates the need of informal conference of representatives of the federal bar with the Conference of Federal Circuit Judges, as recommended in the plan submitted by the Conference of Bar Association Delegates and approved by the American Bar Association and the Conference of Circuit Judges in 1931. (See MASSACHUSETTS LAW QUARTERLY for August, 1931, p. 7; A. B. A. Journal for November, 1931, p. 738.) Decisions of this kind make the law ridiculous in the eyes of litigants and the public, and the courts ought to understand this and avoid raising such issues.

F. W. G.

THE CIRCULAR LETTER OF THE ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS FOR JULY, 1932.*

COMMONWEALTH OF MASSACHUSETTS.

ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS.

July 1, 1932.

To the Justices, Special Justices, Clerks and Probation Officers of the District Courts:—

Your Committee has had the opportunity, this past year, to meet first the County Commissioners of one of the Counties and later with the Association of County Commissioners. At this latter meeting one of the members was the speaker. These meetings have been very gratifying and productive of much information and we trust have been equally enlightening to the Commissioners. We have found the latter desirous of knowing the problems of the courts and on the other hand they wish us to know and recognize their difficulties. Of course, the principal topic for discussion at any such meeting is the cost of maintenance of the courts. The Commissioners are not only feeling the depression and absolute necessity for economy but are looking at the various problems from a long range point of view. The cost of our courts has been steadily increasing—the problem for us to help in solving is how to reduce this cost in our District Courts. We have found a feeling that our courts should sit all day if necessary and so reduce the cost of Special Justices. We append hereto copy of a letter written by one of our members as an answer to a suggestion by one Board of County Commissioners that there was too much use of Special Justices in that County.

Another problem confronting the Commissioners is proper and adequate court rooms and facilities. This is tied in with the question as to whether there should not be some combinations of existing courts and possible changes in the locations or principal offices where the courts sit in more than one place. Modern facilities of travel, state police and changing industrial conditions are important factors in this matter. We hazard the thought that some of the smaller courts may have to be combined with others in order that adequate facilities may be provided and the salaries necessary to secure competent officials be thus distributed over a

* Earlier circular letters of the Administrative Committee since its creation in 1922 will be found in the QUARTERLY for November, 1926, p. 85, for December, 1929, p. 52.

larger volume of business. We desire the utmost co-operation with the Commissioners and therefore recommend that the Special Justices be called for service with the single thought of the real need of such service as the determining factor; that costs be collected in criminal cases wherever justified and permitted by law; that care be taken in the use of the blanks that there may be no waste; that probation and suspension of sentence be employed wherever wise and that costs of commitment of insane persons be required of relatives in such cases as inquiry may reveal to be proper.

One other matter presents a problem to the County Commissioners. Some of the Justices have appointed or solicited the appointment of relatives to various positions in their own courts. The natural inference in such appointments is that these persons have not been successful in obtaining other or more remunerative positions. We cannot but feel that such appointments with rare exceptions are unwise and lead only to trouble. An exception would of course be a person who had had special training.

We now append the copy of the letter above referred to:

"The District Courts of this Commonwealth are very different institutions from those of twenty-five or even ten years ago. It is no longer possible for the Presiding Justices of such courts to transact all the business now passing through them. Especially is this true of the larger courts. The legislature in recognition of the necessity has wisely provided for Special Justices and authorized the Presiding Justices in their discretion to call upon these Specials to assist in the work. The granting of this power leaves to each Presiding Justice the sound determination when such extra service is required. From all we can learn this authority is not generally abused. There may be and doubtless are courts in which more than the average use of the Special Justices is made. These exceptions are doubtless due to special causes unnecessary to enumerate in this letter.

The volume of business in the District Courts and especially in the larger ones has grown very rapidly in the past few years largely because of the increasing use of motor vehicles. This has brought expanding business both on the criminal and civil sides. It is no longer possible for a single justice to dispose of all of the business in these larger courts. Even if he sat as suggested from nine in the morning until four in the afternoon the work could not be done. There are other objections to such lengthy sessions whether held by the Presiding Justice or the Specials. The lawyers who practise in the District Courts receive less compensation than for their work in the Superior Court. Obviously they cannot be in attendance all day long waiting for their cases to be reached.

They do not like to be in these courts beyond the noon hour and the bar must be considered in the management of the business of the courts. Moreover parties and witnesses are subjected to serious pecuniary loss as well as inconvenience if their cases cannot be promptly disposed of. A very serious objection is that the police and other officers cannot be attendant long hours without serious impairment of the efficiency of their respective departments. It very often happens that the officers on a case are night men who must return to their homes for their necessary sleep. A district court is quite different from a superior court. In the latter a single case may take days and the parties know with some assurance when they are likely to be reached. On the other hand, in a district court fifty or one hundred cases may be disposed of in the same time consumed by the superior court in trying one and the work could not proceed if it was necessary to wait for parties, witnesses and lawyers to come to the court upon call. They must all remain in constant attendance, for no one can tell what length of time will be required to dispose of the matters which have priority over their respective cases.

It is perhaps unnecessary to state more fully the situation in these courts. We believe that the Presiding Justices are endeavoring to manage their several tribunals with regard not only to the expense involved but also to the accommodation of all parties."

A Friendly Word.

We have been somewhat concerned of late by reason of the professional engagements and conduct of some of our associates and the items in the press relative thereto. While we disagree with the judgment of these associates as to what is proper for a Judge to do or not to do we question only that judgment.

These matters may be briefly summarized:

I. "Because Judge ——— of the ——— District Court has informed Attorney ——— he will take immediate action in a law suit in which ——— client is interested, Judge Edward P. Pierce of the Supreme Court yesterday dismissed the petition asking that a writ of mandamus be issued to compel Judge ——— to act." The petition set forth that repeated efforts to obtain action on a draft report had failed and that the last letter sent to Judge ——— was returned with the notation at the bottom, "Please don't bother me any more about this case. I don't like your insolence."

Surely there can be no disagreement with the statement that it is the duty of a judge to promptly allow a claim for a report and the report or disallow the same, leaving the parties to their right of petition to establish the report.

II. Again we read that Judge ——— appears as a witness for the defendant in an appealed liquor case though the case had been tried before this same judge in a District Court and the appeal

was from a sentence imposed by him. If a judge feels that an injustice has been or is being done a defendant in another court, surely there are ways to bring the facts to the attention of the prosecuting officer without the necessity of appearing as a witness, an act open to all kinds of misinterpretation and inference. This act of the judge and the news report of the same left a bad impression and the whole District Court system was made to suffer from this ill-advised judgment.

III. Still again we read that one of the defendants indicted for murder has as counsel Judge ——— and later the press records the argument of Judge ——— for this defendant who is found guilty by the jury in record time.

IV. Again we read of a gathering of politicians at which Judge ——— speaks in a scathing manner of certain legislators. They in turn mince no words in reply and call attention to the large amounts paid him for service in the court of which he is a Justice.

Now it is true that all of these Justices are Special Justices. The practice has grown up, however, of referring to both Presiding and Special Justices as "Judge" with no distinction and even in courts where the Specials sit but a few days each year. And we regret to say there seems to be a desire on the part of some men to capitalize both the position and the title. Surely it is not too much to ask that if the Special Justices are to accept the honor and position they shall adopt and follow the same standards as the Presiding Justices. Not a single Presiding Justice, so far as we know, now appears in a criminal case in any court. Few if any of them even appear in a civil case in another District Court and with one possible exception they refrain from all political activities. We look forward to the time when all the Special Justices of the larger courts at least will follow the example of the majority of their number and be as meticulous in their ideals and conduct as the Presiding Justices are expected to be and are.

Inquests.

For ten years the Administrative Committee has sought to have the law respecting the holding of inquests changed by eliminating the mandatory feature. Whatever may have been the reasons for mandatory inquests in cases of death by accident upon a railroad, electric railroad, street railway or by automobile, they have long ceased to be compelling. Every fatality upon or due to these agencies is promptly investigated by one or more government departments or officials. If there is any suggestion of unlawful conduct the party responsible is at once brought before the court. The legislature has at last amended the law by enacting Chapter 118. This act takes effect on September first of the current year. This year we had support for this change. We believe this support was predicated upon our statement that such a change

would reduce the costs of the District Courts to the several Counties. Inquests have often been held by Special Justices and the witnesses have, of course, received their established fees. We see no legitimate reason for hearings after September first except in unusual cases. Any bills for the services of Special Justices or witness fees will properly receive sharp scrutiny. We speak elsewhere of the obligation of our courts to be economical.

Sherborn Reformatory.

We have been requested by Dr. Stearns to call the attention of the Judges to a change in policy in the matter of commitments to Sherborn Reformatory. During Mrs. Hodder's lifetime non-reformatory types were not welcomed to the institution. She felt her work should be confined to cases offering better prospects. The population has now dropped below 250. The new superintendent, Dr. Miriam VanWaters, takes a different attitude and is willing to undertake any type of case however difficult. For this reason the Department of Correction will be glad to have women of any type committed to Sherborn rather than to the State Farm at Bridgewater. The women's building at the State Farm is still open and the Department is, of course, glad to do its best with any whom the Judges prefer to commit there.

Commissioner of Probation.

The Board of Probation recently announced the appointment of Albert Bradley Carter as Commissioner of Probation to succeed Herbert C. Parsons, resigned. Mr. Carter had had experience as assistant to the Commissioner and is already well known to the officials of our District Courts. This reference to the new Commissioner gives us an opportunity to earnestly urge those of our courts not now using the facilities and records of the Board of Probation to do so. There ought not to be any question at this late day of the value of probation and no ignorance of the wealth of material and individual records, at our command, in the offices of the Board. We look forward to an increasing co-operation between our courts and the Board and its executive officer.

A Question:

"A question has arisen in my mind as to the authority of the Court under the provisions of General Laws, chapter 224, section 16, to order the transfer or assignment of the shares owned by a debtor in a corporation to the judgment creditor under a petition in supplementary process.

Section 16 provides that 'If the Court is satisfied that the debtor has property not exempt from being taken on execution, the court may order him to produce it, or so much thereof as may be sufficient to satisfy the judgment and costs of the proceedings, so that it may be taken on the execution, or may order him to

execute, acknowledge if necessary, and deliver to the judgment creditor, or to a person in his behalf, a transfer, assignment or conveyance thereof; or if the debtor is able to pay the judgment in full or by partial payments the court may, after allowing the debtor out of his income a reasonable amount for the support of himself and family, which amount need not be stated, order the debtor to pay the judgment and costs of the proceedings in full or by partial payments from time to time; or the court may make an order combining any of the orders above mentioned.'

Clearly, shares of stock cannot be taken on execution. Assuming that the Court finds that the only property that a debtor has is a note from AB, which is then not yet due. Such a note cannot be taken on execution. How, then, can the Court order the judgment debtor to transfer or assign it to the judgment creditor?

I would greatly appreciate your answering the foregoing questions, as I believe such questions are going to arise in pending cases in our Court."

The Answer:

"I am sorry I had to be away several days last week and your letter had to remain unanswered.

I know it is the practice in many of the larger courts, and I think you will find that this practice is almost universal, to order the transfer or assignment of shares of stock owned by a debtor to a judgment creditor in supplementary proceedings. It is true that Section 16 provides 'If the Court is satisfied that the debtor has property not exempt from being taken on execution', etc., but the phrase 'not exempt from being taken on execution' is held to apply to the specific exemptions such as furniture of so much value, a cow, a pig, etc., and it is further held that under the broad power, supplementary process being equitable in nature, the Court has a right to order a judgment debtor to turn over to the creditor any asset of value unless of course it is exempt under the statute. Most of the exemptions are protective in nature and for the benefit of the family of the debtor.

From the foregoing you will see in the cases which are now in your court the judge may properly order the assignment and transfer of any shares of stock, assuming that all the other factors justifying such an order are present."

The Relationship of the Massachusetts Courts to the Forty-Eight Hour Law.

The above caption is the title of a manuscript prepared by Edwin S. Smith, Commissioner of Labor and Industries.

The substance of this manuscript has appeared in the newspapers. The full manuscript has been sent to us with the suggestion that we comment on it and call the matters therein set forth to the attention of the Judges. We quote from the manuscript:

"So firm is the legal and social foundation of the Massachusetts laws restricting the hours of women employed in laboring that one would expect a corresponding firmness to be displayed by the judiciary in enforcing the penalties of the statute. When the writer recently assumed the office of chief administrator of the Commonwealth's labor laws, he discovered that this very natural hypothesis was incorrect. Recent history indicated that the judicial attitude toward evasion of the forty-eight hour law for women and minors was tolerant to a degree that prompted me to make a public statement that the judges evidently did not take this law seriously.

The basis of this statement was an examination of cases prosecuted under the statute which requires that no child under eighteen and no woman shall be employed in laboring for more than nine hours in one day or more than forty-eight hours in a week. The facts I found were these: Except for a few cases dismissed and those found 'not guilty' there were seventy-seven Court convictions in the period from December 16, 1926, to January 8, 1932, inclusive. The number of convictions, however, is a small part of the story. The statute governing the offence of work by women and boys between sixteen and eighteen in excess of forty-eight hours provides specifically that any one employing a person under such circumstances 'shall be punished by a fine of not less than fifty nor more than one hundred dollars.' (G. L. Chap. 149, Sec. 57.) In the seventy-eight cases examined, thirty were placed on file. In clear contravention of the statutory provisions, fines of $25 were imposed in six cases; $15, two cases; $10, twenty-four cases; and $5 in one case. The minimum statutory fine of $50 was actually imposed in only fourteen cases, or 18 per cent of the total.

Sometimes the employment of women in laboring in excess of forty-eight hours in the week or nine hours in any one day can be definitely proved by witness of the women themselves. At other times a presumption of such overtime work exists when women are employed at a time other than stated on the printed time notice which is required by statute, whether this be before the time set for beginning work, or after or during the assigned meal time indicated in the notice. The law, therefore, makes employment at a time other than stated on the printed notice a violation of the statute carrying the same penalty as for overtime work.

The department may prosecute employers directly for overtime employment when it believes this can be proved by witness or it may prosecute for employment at times other than that stated in the printed notice. Since my investigation of prosecutions on the charge of overtime employment, I have inspected the results of prosecutions for employment at time other than stated on the printed notice. In the period from December 16, 1926, to February 4, 1932, there were one hundred and seventy prosecutions for employing women and minors at time other than stated on the time

notice. Of those found guilty, sixty were placed on file and fines were imposed in ninety-eight cases. The minimum statutory penalty of $50 was imposed in sixty-four cases. Other fines imposed were $25 eight cases; $20 two cases; $15 two cases; $10 sixteen cases; $5 two cases.

So much for the facts. What, then, is the probable determining consideration in the minds of the district judges which prompts these numerous 'filings' and less than the minimum sentences for overtime work. Presumably the answer is not a lack of sympathy for the humanitarian motive underlying the statute.

Does the antipathy by Massachusetts judges toward imposing the statutory sentence for overtime work for women spring from a belief that the statute is economically harmful?

The real reluctance of judges to impose the statutory sentence in overtime cases, I believe, is due to the fact that usually only from two to eight or ten employees are involved. When the number of employees who have been working overtime represents a small percentage of the women employed by the company, a judge may regard the offence as technical rather than serious. When this attitude exists, it fails to take account of the real significance of the forty-eight hour law problem. Few manufacturers are likely to be reckless enough to work their whole force of women overtime in deliberate violation of the statute. The risk is too great. Moreover, the temptation to allow overtime work does not present itself in this wholesale manner. A much more likely occurrence is to permit a few women to work illegally for the sake of 'catching up' in one or more departments.

When the amount of overtime work discovered is not more than fifteen minutes or half an hour, this may seem to the judge inconsequential. It is the responsibility of the department to point out in such cases that the amount of overtime called to the attention of the court represents the time worked before the inspector detected the violation. How much more there might have been if the inspector had not appeared is problematical.

The fact that in a particular case relatively few people may be involved for a relatively small amount of excess time should not in my opinion deter the judiciary from taking the full statutory action provided for. Failure to discourage minor lapses from the law is bound to promote major lapses.

The overtime discovered by the inspectors, who are after all very limited in number, forty to the entire state, probably represents only a fraction of the actual violations. Vigorous action, therefore, by the judges, against offenders who may happen to be brought before them is one of the most potent ways to keep down the total offences. The judiciary is a vital link in the enforcement procedure. If they fail to approach the problem of violation of the forty-eight hour law with the same zealous attitude as the inspection force is required to display, the successful administration of the statute suffers deterioration."

Our comment is as follows:

We have a high regard for Mr. Smith. He is an excellent official. But like all capable administrative or executive heads he is inclined to emphasize the importance of his Department and insist upon severity in the punishment of offenders against the particular laws he must enforce. He would not be of much value to the Commonwealth if this were not so. The courts, however, must maintain a judicial attitude—they cannot be partisans in the enforcement of the laws. They cannot convict except upon evidence. They cannot punish the offence but rather must have regard to the offender. Practical experience has shown that many of the cases referred to by Mr. Smith are trivial—short overtime due to ignorance, sickness of another employee, even a desire to assist an employee with extra pay. Few of the cases are deliberate wilful violations.

In their laudable desire to protect, some departments have obtained legislative sanction for penalties which if enforced in some cases would be oppressive and unjust.

If a woman is employed ten minutes more than a certain number of hours or a child beyond a certain hour, the law says the Court if it punishes at all must impose a fine of $50. Yet the minimum penalty for assaults and larcenies is any fine. These things are mentioned to show the problem which comes up when the offence is technical or very slight. And so cases are filed for the Courts are not obliged to impose a $50 fine. Mr. Smith is wrong in his assumption that a mandatory minimum penalty prevents the Court from having the case filed. Moreover the disposition of cases cannot be regulated by the desire of any particular person to see particular persons punished in a particular way.

If Mr. Smith is correct in his figures, it would seem that the cases where the fines imposed were less than the statutory minimum were errors on the part of the courts. With respect to these cases Mr. Smith has a right to complain. We are sure these errors were not due to any lack of sympathy with the law.

Mr. Smith's contribution is well worth while and should occasion thought and more care on the part of the Judges in imposing penalties. The Judges of Massachusetts, as a class, have no other aim than to deal with criminal cases as wisely as they can within the limitations laid down by the legislature. Whether better results would be obtained if the courts were given more discretion in any particular class of cases need not be here discussed.

Removals to Superior Court.

In our circular letter of January second last we called attention to a sharp increase in the number of cases removed to the Superior Court. This increase has been noted and discussed by the Judicial Council in connection with a study of the congestion in the Superior Court. A five-year comparison is as follows:

	1926 to 1927	1927 to 1928	1928 to 1929	1929 to 1930	1930 to 1931
Civil writs entered	47,413	55,491	62,203	65,571	67,846
Removals to Superior Court	1,775	1,971	1,782	2,376	3,168

We have made a study of the statistics of the individual District Courts. The information thus obtained is interesting. When one court has 2,391 civil writs entered and 82 removals while a neighboring court has 2,363 entries and 574 removals there would appear to be something wrong in the latter court, either with the bar, the Presiding Justice or the Special Justices who hear civil cases. A study of our statistical reports by the several Justices may be enlightening and lead to a lessened number of removals.

Appellate Division Procedure.

In our circular letter of January 1, we briefly referred to the then recently decided case of *Patterson* v. *Ciborowski, et al.* It has seemed to us that it might be useful to publish a memorandum in this case which accompanied the decision upon a motion to recommit the report as established by a Justice of the Appellate Division of the Western District.

In view of the seemingly chaotic state of mind of the counsel at the time the motion was argued, it was thought best to explain what was understood to be the law and procedure in cases of like character.

We quote from the memorandum as follows:

"After a case has been heard by a Trial Judge and decision rendered, either party may, provided he has laid the foundation therefor, claim a report of the case to the Appellate Division, and thereafter file a draft report. The proper procedure under such circumstances is adequately set forth in the discussion of 'Appellate Division Procedure', published by the Administrative Committee of the District Courts in January, 1930. It is the duty of the Trial Judge to establish a report if it is possible so to do. If he disallows the request for a report or fails to establish the report for any reason, the aggrieved party may petition the Appellate Division for the establishment of the report. This petition is forwarded by the Clerk of the originating Court to the Presiding Justice of the Appellate Division. It is the custom for such Presiding Justice to refer the petition to one of the Justices of the Division. The ordinary procedure then is for this Justice to notify the parties they may be heard upon a certain day and at a certain place. The duty upon this Judge is that of establishing the report by determining certain facts. The issues before him are always issues of fact and he may call as witnesses any competent persons including the Trial Judge and counsel and interrogate them as to all relevant matters. After the hearing the Judge may deny the

petition if the aggrieved party is unwilling to accept a report in the form which the Justice is ready to establish or for any other justifiable reason. If the petition is thus denied there is no appeal. Our Supreme Court has repeatedly held to that effect. Counsel have raised the question as to just where they are left in a case where the Justice to whom the petition was assigned has denied it. If an aggrieved party has sought to obtain a report embodying certain statements before the Trial Judge and failing of success in that field has again brought the matter before the Appellate Division and failed a second time he would seem to have exhausted any rights which are his. Without expressing an opinion as to the practice, there seems to be no objection in this as in like cases to the presentation of the matter by the aggrieved party again to the Trial Judge. If he is now willing to establish the report in the manner and form which he originally was willing to adopt a report will thereby be established and the matter can come to the Appellate Division in regular order. If in the exercise of his sound discretion he does not feel that he is obligated so to do, then the aggrieved party's rights are at an end."

Since the decision in the Patterson case, the Appellate Divisions have adopted a uniform procedure which requires the single Justice, to whom a petition to establish a report has been assigned, to report to the full Appellate Division any questions of law arising at and out of the hearing on said petition. The full Appellate Division then passes upon the questions thus raised. From such decisions the Patterson case holds appeals lie to the Supreme Judicial Court.

The legislature has enacted certain laws of interest to the District Courts. A list follows:

Chapter 55. An Act clarifying the law relative to the jurisdiction of District Courts over certain felonies committed by certain juvenile offenders. Approved March 7, 1932.

Chapter 71. An Act authorizing notaries public to take certain depositions. Approved March 12, 1932.

Chapter 84. An Act relative to the time of filing answers to interrogatories in civil actions. The time is extended from ten to twenty days. The Act becomes effective on September 1st.

Chapter 95. An Act relative to the prosecution and trial of persons charged with causing or contributing toward juvenile waywardness or delinquency. Approved March 18, 1932.

Chapter 97. An Act permitting cross-examination of any officer or agent of a corporation which is an adverse party. The Act becomes effective September 1st.

Chapter 105. An Act authorizing the service of process by publication on the Lord's Day. Approved March 23rd.

Chapter 118. Changing the law of inquests. This Act is commented upon elsewhere in this letter.

Chapter 177. An Act relative to the signing of answers to demands calling for the admission of material facts, etc. This Act is effective on September 1st and applies only to actions or suits brought after that date.

Chapter 180, sections 20, 29 and 43 should be carefully read and noted. The Act was approved April 22, 1932.

NEW RULES.

The Executive Committee of the Justices' Association has the responsibility for the printing of these Rules. They will be ready during the summer and arrangements will be made with the several courts for their distribution. It is probable that a small charge will have to be made to the members of the bar for the printed copies.

ARTHUR P. STONE.
PHILIP S. PARKER.
CHARLES L. HIBBARD.

NOTE.

Since the foregoing circular letter was issued, Judge Stone has resigned as presiding justice of the Appellate Division of the Northern District and as a member of the Administrative Committee of District Courts, and, in accordance with the statute, St. 1931, c. 426, ss. 116 and 122 (G. L., Ter. Ed., c. 231, s. 108 and c. 218, s. 43-a), the Chief Justice of the Supreme Judicial Court has assigned Judge Nathaniel N. Jones, of Newburyport, as presiding justice of the Appellate Division for the Northern District and designated him as a member of the Administrative Committee of the District Courts.

The new rules of the Municipal Court of the City of Boston are obtainable at the Clerk's office.

TABLE OF ENTRY AND JURY FEES IN THE VARIOUS STATES.

(From the Fifth Report of the Rhode Island Judicial Council, pp. 28-29.)

State	*Entry Fees*	*Jury Fees*
Alabama	None	None
Arizona	Plaintiff $10; Defendant $5.00	Jurors' fees attached as costs
Arkansas	Supreme Court $11.50	$3.00
California	$5.00 to $10.00	$40.00 first day $24.00 each day thereafter
Colorado	$3.00 to $12.50	$5.00 to $60.00
Connecticut	$1.00 to $7.00	$10.00
Delaware	$2.00 to $25.00	
Florida	$5.00 to $12.00	None
Georgia	$3.00	
Idaho	$5.00	None
Illinois	Plaintiff $15; Defendant $5.00	$8.00 per day
Indiana		$4.00
Iowa	$1.50	$8.00 per day
Kansas		
Kentucky	$5.50	$4.00
Louisiana		$12.00
Maine	$ .50	
Maryland	None	None
Massachusetts	District Ct. $1; Superior and Supreme Ct. $3.00 to $5.00	None
Michigan	$3.00	$3.00
Minnesota	$2.00 to $3.00	No fee for jury of six $2.00 for twelve
Mississippi	$.25 to $1.50	
Missouri	$3.00 to $25.00	$12.00
Montana	$2.50 to $5.00	None
Nebraska	$2.50 to $25.00	$5.00
Nevada	$1.00	$36.00 per day
New Hampshire	$1.20	None
New Jersey	$1.00 to $4.00	$4.00 to $11.75
New Mexico	$5.00 to $7.50	$36.00 per day
New York	$1.50 to $20.00	$6.00 to $12.00
North Carolina	$12.00	
North Dakota	$5.00	None
Ohio	Supreme Court $20.00	None

State	*Entry Fees*	*Jury Fees*
Oklahoma	$5.00 to $25.00	Jurors' fees attached as Costs
Oregon	$5.00 to $10.00	$2.00
Pennsylvania		$4.00
Rhode Island	District Ct. $1; Superior and Supreme—None	None
South Carolina	None	None
South Dakota		None
Tennessee	None	
Texas		$3.00 to $5.00
Utah	$12.00 to $14.50	$5.00
Vermont	$1.00 to $5.00	$4.00
Virginia		None
Washington	$5.00	$12.00
West Virginia		
Wisconsin	$1.00 to $3.00	None
Wyoming	$1.00 to $5.00	$12.00